

NO. 49576-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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In re the Marriage of:

JUDITH LEE BURKS,

Appellant,

vs.

WALTER G. BURKS,

Respondent.

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Appellant Judith Lee Burks and Respondent Walter G. Burks were married on December 12, 1986, and thereafter lived together as husband and wife for almost 28 years before they separated in October of 2014. CP 43-44. Following their separation Ms Burks filed a summons and petition for dissolution. CP 1-5, 6-11. This case eventually came for trial over three days, during which Ms Burks testified as the only witness for Petitioner and Mr. Burks and his daughter Tonya Garrigues testified as the only witnesses for Respondent. RP 4/26/16 1-262; RP 4/27/16 1-142; RP 4/28/16 1-67. A few weeks after the trial in this case the court entered an eight page written ruling. CP 17-24. The court later incorporated this ruling into written Findings and Conclusions, which states as follows in relevant part:

### **9. Community personal property**

Each spouse should keep any community personal property that s/he now has or controls. The spouses' community personal property is listed in the attached Exhibit "A" which is made a part of these findings.

**Conclusion:** The division of community personal property described in the final order is fair (just and equitable).

### **10. Separate personal property**

Each spouse should keep any separate property that s/he now has or controls. The spouses' separate personal property is listed in the attached Exhibit "A" which is made a part of these findings.

**Conclusion:** The division of community personal property

described in the final order is fair (just and equitable).

**11. Community debt**

The spouses' community debt is listed in Exhibit "A". This Exhibit is attached and made part of these Findings.

**Conclusion:** The division of community debt described in the final order is fair (just and equitable).

**12. Separate debt**

The separate debt has been divided fairly between the spouses.

**Conclusion:** The division of separate debt described in the final order is fair (just and equitable).

**13. Spousal support**

Spousal support was requested and should be ordered because of the financial resource of the parties; the standard of living established during the marriage; the duration of the marriage; the age, physical and emotional condition and financial obligation of the spouse seeking maintenance; and the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking maintenance.

The Petitioner shall be required to apply for all social security benefits (within 30 days with proof of application to Respondent's Counsel) she may be entitled to from all of her current/prior spouses. Once the total social security benefits available to the Petitioner are determined, the total Social Security benefits between the parties shall be equalized, with the party with the greater social security paying one-half of the difference between the amounts to the other spouse. This amount shall be adjusted yearly in February to reflect any changes in benefits from COLA or any other reason.

**22. Other findings or conclusions:**

**Property Characterization Discussion:**

### Accident Recovery Proceeds

The Respondent received two different accident recoveries during the marriage. Both were from auto accidents. The documentation provided would indicate that the recoveries were not for lost wages or other community reimbursement. The accident recoveries, when received, were separate property. However, the Respondent did not segregate those funds in any way. The husband deposited the funds into a joint account along with various earnings and other community funds. This account continued to be the main transactional account for the parties until separation. Community bills were regularly paid from the account.

There was no evidence provided to the Court, either via documentation or testimony, which would allow a tracing of those funds to a current account or asset. This co-mingling is such that any separate property characterization has been lost, and the Court finds no separate property interest in the accident recovery funds exist. Any property purchased using funds from this account would likewise be considered community property.

### Wife's Checking and Investment Accounts

The most complicated asset of the parties is the Wife's Vanguard/Smith Barney and U.S. Bank financial accounts. In order to properly characterize the funds, all of the various deposits into that account need to be analyzed. Initially, other than the Wife's testimony, there is little to qualify all of the less-than-\$1,000 deposits as separate. Most, but not all, seem to line up in time with birthdays and Christmas, however there is nothing else to bolster that characterization.

The parties stipulated that the one \$7,500.00 life insurance policy proceeds were, in fact, separate from wife's parents' estate. The Court would find that to be the case.

Things get a bit less clear on the other large deposits. (For Findings purposes, the Court only included actual infusions from outside sources, not intra-account transfers.) All deposits referenced are from the Petitioner's illustrative exhibit provided at trial.

1. October 21, 2010, deposit \$15,000.00 - It is unclear exactly what this was. Apparently, the parents were making a \$25,000.00 gift, but kept \$10,000 as one-half payment of the community loan they had made to the Petitioner and Respondent. The note indicates in the Mother's name that the note was paid in full by Judy (the Petitioner) signed off by the Mother, Helen Gano. Clearly, the forgiveness of the community debt by the parents would indicate that gift was at least partially to the community. There being nothing else to indicate otherwise, it would normally be considered a gift in full to the community.
2. May 9, 2011, deposit \$25,000.00 - Check from her mother (#2) signed by both mother and father. Would seem to indicate was from both to assure it fell under the gift tax exemption of \$13,000 for 2011. No indication on the face of the document it was to her alone. No accompanying note.
3. April 27, 2012, deposit \$25,000.00 - This deposit included a handwritten notation (#34-36) from her parents indicating it was from "Mom and Dad" to the wife. It was contemporaneous with the check. The check signed by both parents.
4. April 22, 2013 IRA deposit of \$3,962.70 - There was uncontroverted testimony that the husband told the Petitioner/wife that "she could keep" these funds for herself. The statement was made at the time of the gift.
5. June 25, 2013, deposit \$3,000.00 - Petitioner testified this was a gift. No indication on the documentation of it being a gift to her alone (#37).
6. March 24, 2014, U.S. Bank \$50,000.00 deposit - indicated "from Dad" (#38) the wife testified this was a gift. The wife, however, consistently testified that the larger gift transfers were "tax free." The Court can take Judicial Notice that the maximum tax-exempt gift to one person from a community in 2014 would have been \$38,000.00. This would tend to indicate the "gift" was to both husband and wife.
7. July 28, 2014, deposit - \$25,000.00 - Wife testified this was a gift. This check would indicate "gifts" totaling \$75,000 in 2014 as of

that date.

8. September 2, 2014, deposit - \$12,891.75 from Father's Vanguard.
9. September 2, 2014, deposit - \$73,363.30 from Father's Vanguard.
10. September 2, 2014, deposit - \$73,688.76 from Father's Vanguard - these three transfers (8-10) certainly bear all of the indications of either a) an on-death transfer; or b) a beneficiary transfer. There was no statement indicating that the transfer was such, nor any documentation from the father's account showing her as the beneficiary.

The above analysis would tend to indicate that of the amounts sitting in the wife's accounts, there is an indication that the wife's parents were gifting an annual financial gift of about \$25,000 - most likely as an estate plan. There really is no convincing documentation to indicate such a plan. The presumption of community property is very strong. It would be a leap for the Court to find the presumption of a gift to the community without more compelling evidence than the Petitioner's self-serving statements. Of the money in the account, only the one stipulated item - the \$7,500 from the parent's insurance policy appears to be convincingly separate property.

The Court will note that the tracing of assets on these accounts would be sufficient in the Court's view to maintain community or separate status if the Court were able to determine a separate status of each "gift" at the time of acquisition.

#### Husband's Vanguard 401-k

The parties agree this is community property awarded to the Husband.

#### House Proceeds

The house proceeds are community property. The Wife, post separation, paid the property taxes and made reasonable repairs to accommodate sale. Wife should be reimbursed the tax payment and claimed home repair costs off the top of the house proceeds, with the balance being divided equally.

### Husband's House in Tri Cities

The Husband purchased this asset post separation using funds from accounts awarded to the Husband. He will be awarded this asset; however, the funds used to purchase it will not be reduced from the separation date balance of the source accounts.

### Personal property

There is no claim for a return of or exchange of personal property and it appears that based upon the values expressed at trial. The difference of value of personal property currently in each party's possession appears to be diminimus and will be presumed equal.

### 2000 Chevy pickup

This was purchased from the community bank account, sometime after the personal injury funds went into that account. The Wife has made extensive repairs in excess of any residual separate value that may have existed. In addition, she has historically driven this vehicle, it will be awarded to her at \$5,000.

### Chrysler Sebring

This was purchased by the Husband, and has always been driven by him. He will be awarded the Sebring at \$3,000.00.

### Repayment of the Parties' promissory note to Wife's parents

Given the above analysis of accounts, there will be no repayment to the Wife for repayment of this debt.

### Debts

The Husband should pay the \$1,000 PeaceHealth bill and it should be credited on his side of the balance sheet. The Husband should pay his separate property mortgage on his home in Tri Cities.

The Wife should pay the Macy's and Macy's American Express accounts and they should be credited on her side of the balance sheet.

Other

Neither party has enough in their relative incomes to pay their regular living expenses in full at their pre-separation levels without delving into their other assets. At this stage of life, it would be normal to do so.

It is the finding of the Court that this is a case where equity must overtake simple accounting.

CP 43-49.

Following entry of these findings and conclusions Appellant filed a Motion for Reconsideration and supporting Memorandum of Authorities. CP 55-60; 61-115. In the motion Ms Burks made the following five arguments:

(1) that under CR 59(a)(1) there was an “irregularity in proceedings” when the trial court considered a trial aid as evidence and mischaracterized evidence;

(2) that under CR 59(a)(3) there was “accident or surprise” in that Respondent failed to acknowledge certain of Petitioner’s arguments;

(3) that under CR 59(a)(4) there was “newly discovered evidence” affecting the trial court’s mischaracterization of separate assets as community;

(4) that under CR 59(a)(7) substantial evidence did not support the trial court characterization of marital assets as community instead of characterizing those assets as Ms Burks separate property; and

(5) that under CR 59(a)(9) the court’s division of property did not do “substantial justice.”

CP 61-115.

The trial court subsequently entered a lengthy Ruling on Motion to Reconsider in which the trial court made a number of findings of fact and

then denied each of Appellant's arguments, after which Ms Burks filed a timely notice of appeal. CP 116-119. The court's ruling stated as follows:

This matter having come before the Court upon Petitioner's motion to reconsider its trial ruling, the Court having reviewed the record and file and having considered the motion, declarations and memorandums, the Court makes the following ruling:

For reference, some basic initial findings of the Court will be repeated for reference.

1. The parties were married approximately 28 years at separation and are both in their 70's, and are receiving Social Security Retirement incomes.
2. This is a long term marriage and with elderly litigants, the Court looks to putting them both in similar financial positions for the rest of their lives.
3. Neither is likely, nor should they be required, to return to the work force in any regular capacity.
4. The parties both have no dependent children born of the marriage, though both have adult children.
5. The parties have acquired various items of property, both real and personal, which were of both separate, as well as community in character when the items were acquired.

**Ruling on Motion to Reconsider.**

**CR 59(a)(1)** That a party may present a court aid for their case to assist the Court to organize facts in a complicated case is both normal and appreciated. A court aid is not evidence and the Court does not consider it as evidence. It is a document presented to assist the court and organize the presentation of evidence at trial. Positions presented in court aids often differ somewhat from evidence presented, and often change during the course of the presentation of evidence during the trial.

The Court, in this case, did not rely on federal tax law to make its findings, but merely placed that information in the ruling as an illustration of the lack of proof presented regarding separate/community property. The burden was not to show the property was community, but rather to prove it was separate.

**CR 59(1)(3)** As stated above, the court aid is not evidence and the Court did not, and does not, consider them as such. The decision was made based upon evidence presented at trial.

**CR 59(1)(4)** The rule regarding newly discovered evidence pertains to information that was not, or could not have been available or found in a diligent course of investigation. Given the discovery history of this case, and the obvious past dates of most all the documents referenced, they would have been available over the year long process of the case.

The argument that money from an account that on one occasion was an agreed gift or inheritance to one party certainly does not indicate that all transfers from that same account would be of the same characterization. Each transfer to be characterized as a gift or inheritance would need to be able to stand on its own, absent some proof that all said transfers were of the same classification.

Additionally, any new evidence would only be applicable to the request for a new trial, not for a motion to reconsider.

**CR 59(a)(7)** Contrary to Petitioner's arguments, she did testify to each of the transfers, but did not, other than the bank statements, present any additional evidence as to the separate or community nature of each. She essentially testified to entries on a series of statements and gave her take on them.

Uncontroverted testimony does not alone overcome the community property presumption. An analogy would be the Petitioner simply stating, "The car is my separate property. I got it from my parents." Such testimony alone would not sustain an argument such to overcome the community presumption.

The content of the testimony needs to provide evidence to the trier of fact that is clear and convincing. The burden was not met in this case.

**CR 59(a)(9)** In looking at substantial justice, it can be somewhat compared to an equitable division concept. Had the Court been convinced that the Petitioner's assertions of separate property were clear and convincing, the Court still has the ability to divide and distribute separate property to effect a fair and equitable outcome in a long-term marriage case such as this.

In a dissolution action, the trial court must order a "just and equitable" distribution of the parties' property and liabilities, whether community or separate. RCW 26.09.080. All property is before the Court for distribution. *Farmer v. Farmer*, 172 Wash.2d 616, 625, 259 P.3d 256 (2011). When fashioning just and equitable relief, the Court must consider (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 property distribution is to become effective. RCW 26.09.080, LARSON v. CALHOUN, 178 Wash.App. 133 (2013)

As stated above, these folks were married for 28 years and are both in their 70's. The principles of equity dictate they be put into positions that are roughly similar so they can live the remainder of their lives at a similar lifestyle. The award of property as set out in the Court's decision achieves the equitable end.

Attorney's fees are determined based on need and ability to pay, absent wrongdoing. Based on that principle, each party shall pay their own attorney fees.

The motion to reconsider, together with the motion for new trial, are both denied.

CP 116-119.

## ARGUMENT

### I. APPELLANT'S FAILURE TO ASSIGN ERROR TO THE TRIAL COURT'S FINDINGS OF FACT WITH SUFFICIENT SPECIFICITY TO ALLOW FOR EFFECTIVE APPELLATE REVIEW MAKES THOSE FINDINGS VERITIES ON APPEAL.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In addition, an assignment of error to a finding of fact or conclusion of law must be made with sufficient specificity to put the court and opposing party on notice as to the substance of the argument being made. *In re Estate of Lint*, 135 Wn.2d 518, 957 P.2d 755 (1998); RAP 10.3(a)(4). As noted in *Lint*, it is not the court's duty "to comb the record with a view toward

constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings.” *Lint*, 135 Wn.2d at 532. Thus, the court “will not review issues for which inadequate argument has been briefed or only passing treatment has been made.” *State v. Thomas*, 150 Wn.2d 821, 868–69, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Finally, absent “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record,” the court will not review an assignment of error. RAP 10.3(a)(6).

In the case at bar, following two days of testimony, the trial court entered extensive findings of fact and conclusions of law setting out the extent and nature of the marital community’s separate and community property as well as the court’s conclusions as to what was an equitable distribution of that property. The trial court initially entered these finding on May 11, 2016, under the title “Court’s Ruling.” and then reentered them on July 29, 2016, under the title “Findings and Conclusions About a Marriage (FNFCL).” In the latter document, the findings are numbered 1 through 22, with each finding running from one sentence to two paragraphs in length with the exception of findings 10 and 22.

Finding No. 10, which incorporates an appendix, states as follows:

## 10. Separate Personal Property

Each spouse should keep any separate property that s/he now has or controls. The spouses' separate personal property is listed in the attached Exhibit "A" which is made a part of these findings.

**Conclusion:** The division of community personal property described in the final order is fair (just and equitable).

### EXHIBIT "A"

Property to Petitioner/Wife		Property to Respondent/Husband	
½ Chase Bank	\$23,339.00	½ Chase Bank	\$23,339.00
HH Property	10,000.00	HH Property	10,000.00
2000 Chevy pickup	5,000.00	Chrysler Sebring	3,015.00
Reimb house repairs/taxes	1,310.00	401K Vanguard	35,000.00
Life Insurance in own name	Equal	Life Insurance in own name	Equal
½ U.S. Bank #1186	900.00	½ U.S. Bank #1186	900.00
½ U.S. Bank #2697	10,542.00	½ U.S. Bank #2697	10,542.00
½ MorganStanley #2032*	175,543.00	½ MorganStanley #2032*	160,543.00
½ MorganStanley #4032*	6,209.00	½ MorganStanley #4032*	6,209.00
		unpaid fees	300.00
House proceeds	74,081.00	House proceeds	38,093.00
Debts to Petitioner/Wife		Debts to Respondent/Husband	
Macy's	265.00	PeaccHealth	1,000.00
Macy's - AMEX	100.00		

\*The Investment Accounts are listed as separation date values. Any increase or decrease in those accounts due to market changes shall follow the party to whom awarded. As the accounts are to be divided equally, there should be an equal sharing of the profit/loss.

The Morgan Stanley #2032 account difference reflects the \$7,500.00 life insurance separate funds of Petitioner that are in this account.

The home proceeds allocation takes into account reimbursement to Petitioner for

house taxes paid (709.00) and repair costs to enable the sale of the home (\$1,100.00).

CP 33, 44.

Finding No. 22, entitled “Property Characterization Discussion,” is even more extensive than Finding No. 10. Finding No. 22 is four pages in length single-spaced and includes over 26 paragraphs dealing with the identification, characterization and distribution of the majority of the marital assets. It is set out in its entirety in the preceding Statement of the Case and will not be repeated here.

In spite of the extensive nature of findings 10 and 12, appellant has made no attempt to identify for this court or Respondent which portions of the findings Appellant claims are unsupported by substantial evidence. Rather, appellant simply assigns error “in” each finding. Specifically, Appellant’s first two assignments of error state:

1. The Petitioner asserts error in Finding and Conclusions 10.
2. The Petitioner asserts error in Finding and Conclusion 22.

Brief of Appellant, page 3.

Given the extensive nature of findings 10 and 22, Appellant’s complete lack of any specificity in these two assignments does not put this court or Respondent on notice as to the substance of the argument or arguments being made. *cf. Lint, supra; see also* RAP 10.3(1)(4). As was

previously noted from *Lint*, it is neither the court nor the Respondent's duty "to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings." *Lint*, 135 Wn.2d at 532. Thus, in the case at bar, this court should refuse to review these two assignments of error and consider Finding No. 10 and Finding No. 12 as verities on appeal.

While Appellant did at least ostensibly assign error to findings 10 and 12, no such claim, ostensive or otherwise, was made for the findings of fact the court entered as part of the denial of the Motion for Reconsideration. While this document includes a number of conclusions of law, it also includes the following factual findings and mixed findings of fact and conclusions of law:

1. The parties were married approximately 28 years at separation and are both in their 70's, and are receiving Social Security Retirement incomes.
2. This is a long term marriage and with elderly litigants, the Court looks to putting them both in similar financial positions for the rest of their lives.
3. Neither is likely, nor should they be required, to return to the work force in any regular capacity.
4. The parties both have no dependent children born of the marriage, though both have adult children.
5. The parties have acquired various items of property, both real and personal, which were of both separate, as well as community in character when the items were acquired.

***Ruling on Motion to Reconsider.***

The Court, in this case, did not rely on federal tax law to make its findings, but merely placed that information in the ruling as an illustration of the lack of proof presented regarding separate/community property. The burden was not to show the property was community, but rather to prove it was separate.

**CR 59(a)(4)** The rule regarding newly discovered evidence pertains to information that was not, or could not have been available or found in a diligent course of investigation. Given the discovery history of this case, and the obvious past dates of most all the documents referenced, they would have been available over the years long process of the case.

The argument that money from an account that on one occasion was an agreed gift or inheritance to one party certainly does not indicate that all transfers from that same account would be of the same characterization. Each transfer to be characterized as a gift or inheritance would need to be able to stand on its own, absent some proof that all said transfers were of the same classification.

Additionally, any new evidence would only be applicable to the request for a new trial, not for a motion to reconsider.

**CR 59(a)(7)** Contrary to Petitioner's argument, she did testify to each of the transfers, but did not, other than the bank statements, present any additional evidence as to the separate or community nature of each. She essentially testified to entries on a series of statements and gave her take on them.

Uncontroverted testimony does not alone overcome the community property presumption. An analogy would be the Petitioner simply stating, "*The car is my separate property. I got it from my parents.*" Such testimony alone would not sustain an argument such to overcome the community presumption.

The content of the testimony needs to provide evidence to the trier of fact that is clear and convincing. The burden was not met in this case.

CP 116-118.

In this order the court made a number of factual findings concerning the testimony and other evidence presented at trial, including findings that the court did not believe or accept Appellant's testimony that the monies she obtained from her father constituted her separate property or that she maintained them as separate property. It was well within the trial court's discretion as the trier of facts to believe or disbelieve any testimony presented, and it was well within the trial court's discretion to give what weight it chose to that testimony and that evidence. In any event, to the extent the court's ruling on the motion for reconsideration contains findings of fact, Appellant's failure to assign error to those findings means that they are verities for the purpose of this appeal.

It is true that a trial court's characterization of property as separate or community presents a mixed question of law and fact for the purposes of appeal. *In re Marriage of Martin*, 32 Wn.App. 92, 94, 645 P.2d 1148 (1982). Questions of fact on this issue include the "time of acquisition, the method of acquisition, and the intent of the donor, for example, are questions for the trier of fact." *Martin*, 32 Wn.App. at 94. Thus, on appeal, the court reviews

these factual findings supporting the trial court's characterization for substantial evidence. *In re Marriage of Mueller*, 140 Wn.App. 498, 504, 167 P.3d 568 (2007). However, the ultimate characterization of the property as community or separate is a question of law that the court reviews de novo. *Mueller*, 140 Wn.App. at 503-04. Thus, in the case at bar, to the extent the findings entered in the denial of the motion for reconsideration include conclusions of law on the ultimate characterization of the property, they are not verities on appeal. However, as the following explains, in this case (1) the trial court did not abuse its discretion when it classified the property here as issue, and (2) the trial court's division of property was just and equitable regardless of any mischaracterization of property that might have occurred.

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT APPELLANT HAD FAILED TO MEET HER BURDEN TO PROVE THAT CERTAIN FINANCIAL TRANSFERS FROM HER FATHER CONSTITUTED HER SEPARATE PROPERTY.**

The character of property, whether separate or community, is determined at the time of acquisition. *In re Marriage of Pearson-Maines*, 70 Wn.App. 860, 865, 855 P.2d 1210 (1993). Thus, property acquired during marriage is presumed to be community property. *Id.* In order to rebut this presumption, a party has the burden of presenting "clear and convincing evidence" that the property was acquired as separate property or with separate funds. *In re Marriage of Skarbek*, 100 Wn.App. 444, 449, 997 P.2d 447

(2000). This requirement of clear and convincing evidence “is not met by the mere self-serving declaration of the spouse claiming [that she acquired] the property in question . . . from separate funds and a showing that separate funds were available for that purpose.” *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950). In addition, “the longer the duration of the marriage the more likely the court will assume that assets in the possession of the spouses are community.” 19 Kenneth W. Weber. *Washington Practice: Family and Community Property Law* § 10.4 at 137 (1997).

For example, in *Berol v. Berol*, *supra*, the husband in a divorce proceeding appealed the trial court’s determination that a life insurance policy naming his mother as the beneficiary was community property, in spite of his testimony that although he had purchased it only 14 months after marriage with a lump sum payment out of his separate assets. On appeal, the court first noted that the law presumed that the asset was community since it was acquired during marriage. The court then noted that the husband could only overcome this presumption through the presentation of clear and convincing evidence. Finally, the court noted that the husband’s testimony alone could never meet this burden. The court’s language on this issue was as follows:

The policy on the life of the husband, with his mother as beneficiary, was taken out more fourteen months after the parties were married. There was no attempt to establish that the payment made on the policy, a lump sum of \$4,467.94, came from the husband’s separate funds, save his bald statement to that effect. The

burden rests upon the spouse asserting the separate character of the property acquired by purchase during the marriage status to establish his or her claim by clear and satisfactory evidence. The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose. Separate funds used for such a purpose should be traced with some degree of particularity.

It is our view that the husband failed to establish the separate character of the insurance policy in question, and that its cash value of \$4,961.82 should have been considered a community asset, and that the money award to the wife should be increased by one half of that amount, i. e., \$2,480.91.

*Berol v. Berol*, 37 Wn.2d at 381-82 (citations omitted); *see also In re Marriage of Kile & Kendall*, 186 Wn.App. 864, 347 P.3d 894, 900 (2015) (community labor and assets used to farm land leased as the wife's separate property converted the leases to community property).

In the case at bar appellant argued that the trial court erred when it determined that "a number of financial transactions" were community property in spite of Appellant's testimony that there were gifts from her family that she maintained as separate property. Specifically, Appellant argued as follows:

At the trial in the present case, there was lengthy testimony by the Petitioner regarding the nature of a number of financial transactions that were claimed to be separate property. VRP of April 26, 2016 at 203-210. Ms. Burks identified that financial gifts from her parents were maintained by her separately in the separate account. *Id.* at 212. The account however was determined to be community property by the court. Mr. Burks acknowledged he had no idea of the amount of these gifts and that they were maintained as separate specifically to

keep them away from him. VRP of April 27, 2016 at 125-126, 134 (A. "She always said everything was gifted money so she never would have to share anything.")

Ms. Burks further testified that financial transactions comprising an investment account were an inheritance from the estate of her father. VRP of April 26, 2016 at 196, 213-216, 237. Mr. Burks provided no testimony refuting the nature of [] these transactions.

Brief of Appellant, page 7.

Appellant's arguments fail for a number of reasons. Initially, it should be noted that Respondent's testimony that his wife "always said everything was gifted money so she never would have to share anything" is no evidence of the character of any marital assets as separate or community for two reasons. First, Appellant has failed to even attempt to identify which account is being mentioned in this passage, when it was created, and how it was maintained. Thus, it is impossible to determine the validity of this argument. Second, Appellant has failed to cite to any case law to indicate that somehow one spouse's statement that the other spouse claimed that an asset was separate somehow makes that asset separate.

In addition, Appellant's claim that "Mr. Burks provided no testimony refuting the nature of these transactions" somehow transforms certain accounts into one spouse's separate property also fails for two reasons. First, as was just mentioned in the previous paragraph, Appellant has failed to specifically identify the assets to which she is referring, in spite of that fact

that Appendix A attached to a number of documents in the record specifically identifies and quantifies marital assets. However, appellant's claim is more problematic because it ignores the presumption that all assets obtained during the marriage are community absent clear, cogent and convincing evidence to the contrary. Thus, the issue is not that "Mr. Burks provided no testimony refuting the nature" of certain, amorphous transactions or accounts. Rather, the issue is that Appellant fails to show in her brief that she presented clear and convincing evidence to refute the presumption that the property was community.

Also, appellant's arguments that the trial court erred when it failed to characterize certain assets as her separate property also fails for the reason that the only evidence to which Appellant cites in her brief to support this claim is her own testimony. As has been set out in numerous cases, including *Berol v. Berol*, "the mere self-serving declaration of the spouse claiming the property in question [was] acquired . . . from separate funds and a showing that separate funds were available for that purpose" does not constitute clear and convincing evidence sufficient to overcome the presumption that the assets were community property. *See Berol* at 382. Thus, in this case appellant's arguments fail.

In this case Appellant further argues that "[t]he evidence at trial was uncontested that the money received as a gift by the Petition was separate

property.” and that

[T]he property received in the Vanguard Account by the Petitioner was resulting from a death benefit. That is sufficient to establish the nature of the property as separate property and the Respondent presented no testimony or evidence to the contrary.

Brief of Appellant, page 8.

First, Appellant fails to cite to any evidence in the record on appeal to support these bald factual statements. It is not the duty of this court to review the record to determine whether the claimed evidence exists. Second, even had Appellant cited to her own testimony to support this claim, this evidence would still not constitute clear and convincing evidence sufficient under *Berol* and related cases to overcome that strong presumption that the assets obtained during a 38 year marriage were community.

Finally, in this case Appellant argued as follows:

The court noted that the deposits of September 2, 2014 from the Vanguard account of the Petitioner’s father “certainly bear all of the indications of either a) an on death transfer; or b) a a beneficiary transfer.” CP at 47, line 22. The Court nonetheless found the assets to be community property subject to division at the time of trial. CP at 48.

Brief of Appellant, pages 7-8.

This argument fails for two reasons. First, it fails to acknowledge the rule that a trial court’s initial statements following an argument or trial are not the ruling of the court. Rather, they are preliminary statements that the trial court is free to later adopt *in toto*, modify to any extent the court sees fit,

or reject *in toto*. *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-567, 383 P.2d 900 (1963) (We look to the trial court's written findings, rather than its oral statements, as a trial court is free to reconsider its determinations between the time it announces an oral decision and the time it enters written findings.) Thus, to the extent the trial court's initial statements conflict with its later findings, that initial statement does not support an argument contrary to the findings.

In addition, Appellant's claim that "[t]he Court nonetheless found the assets to be community property" is itself a fundamental misstatement of what the trial court did in this case and what the applicable law is. The trial court did not "find" that certain "assets" were community property. The reason is that both parties agree that the assets arose during the marriage and therefore were presumed to be community property. Thus, what the trial court held was that the law presumed the disputed assets were "community property." The trial court did not need to find them to be so. What the trial court found in this case was that the appellant had failed to present clear and convincing evidence sufficient in the court's eyes to overcome this presumption. The difference between the claim that (1) the trial court "found" the assets to be "community property," and (2) the trial court "found" that the appellant had failed to meet the burden of proving the property to be otherwise" is fundamental to the law on community property

and fundamental to the facts of this case. Thus, in this case, the trial court did not err in its finding that the property was presumed to be community and that Appellant had failed to overcome this presumption.

**III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT MADE A JUST AND EQUITABLE DISTRIBUTION OF ALL SEPARATE AND COMMUNITY ASSETS FOLLOWING THE DISSOLUTION OF A 28 YEAR MARRIAGE OF TWO RETIRED PERSONS.**

Under RCW 26.09.080, a trial court in a dissolution proceeding is required to make a “just and equitable” distribution of all marital assets whether separate and community in nature based upon the following four criteria:

(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, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.080; *see also, In re Marriage of Larson*, 178 Wn.App. 133, 137, 313 P.3d 1228 (2013) (“All property, community and separate, is before the court for distribution).

For many years Washington case law followed the rule that each spouse should normally be awarded his or her separate property and that the

court should only give one spouse the separate property of the other spouse in “exceptional circumstances.” *See e.g., Merkel v. Merkel*, 39 Wn.2d 102, 115, 234 P.2d 857 (1951). In 1985 the Washington Supreme court abandoned this ruled, holding as follows:

This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property. The character of the property is a relevant factor which must be considered, but it is not controlling.

*In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985).

Because trial courts as the finders of fact are in the best position to determine and weigh all of the facts that determine a just and equitable distribution of marital assets, courts on appeal court will only reverse the trial court’s asset distribution upon proof of a manifest abuse of discretion. *Larson*, 178 Wn.App. at 138; *In re Marriage of Wright*, 179 Wn.App. 257, 262, 319 P.3d 45 (2013).

Although property distribution in a dissolution proceeding must be “just and equitable,” it may be equal but need not be. *Larson*, 178 Wn.App. at 138; *Rockwell*, 141 Wn.App. at 243. As the court explained in *Larson*, there need not be mathematical precision in the division of marital property. *Larson*, 178 Wn.App. at 138. Rather, that property distribution simply needs to be “fair,” meaning that the trial court makes it after considering all

circumstances of the marriage. *Id.*

For example, in *In re Marriage of Doneen*, 197 Wn.App. 941, 391 P.3d 594 (2017), the parties divorced after a 45 year marriage. Following the trial the court determined that the value of the community property at \$151,143.00 and the value of the husband's separate property at \$1,025,978.00, which he had received from his mother, father and aunt's wills. Neither party disputed the characterization or valuation of the property. The court then awarded the husband \$845,588.50 of the combined assets and the wife \$331,532.50. Following this decision the wife appealed, arguing that under the decision in *In re Marriage of Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (2007), the trial court was required to place the parties in roughly equal financial positions for the rest of their lives, regardless of the character of the property as separate or community given the length of the marriage.

In addressing this argument the court first noted that while *Rockwell* certainly allowed the trial court in its discretion to award an even split of all marital property even when the majority was the separate property of one spouse, the decision did not require an even distribution. The court held as follows on this point:

[The wife's] reliance on *Rockwell* is misplaced. The *Rockwell* court affirmed the trial court; its holding was permissive in nature, not mandatory. *Rockwell* does not support [the wife's] contention that trial courts are required to divide all the property equally in a long-term marriage and ignore the property's character.

In making this argument, [the wife] focuses almost entirely on the third factor in RCW 26.09.080: the duration of the marriage. Her argument suggests that the trial court should have relied on this factor to the exclusion of the others. But in [*In re Marriage of*] *Konzen*, [103 Wn.2d [470], 478, 693 P.2d 97(1985)] the court explicitly rejected any approach that focused on one factor and excluded all others. [The wife] ignores that RCW 26.09.080 also directs trial courts to consider the nature and extent of the separate and community property.

*In re Marriage of Doneen*, 197 Wn.App. at 950 (some citations omitted).

In *Doneen*, the court goes on to note that the trial court had properly considered all of the factors in RCW 26.09.080 and that the distribution it chose was well within the discretion of the trial court. As a result, the court affirmed the decision of the trial court.

In the case at bar, a review of the trial court's findings, particularly those from the denial of the Motion for Reconsideration, reveal that the trial court in this case carefully reviewed all of the evidence, carefully considered and applied each of the four factors from RCW 26.09.080 and then determined that regardless of the characterization of the property as separate or community as argued by both sides, it felt that a just and equitable distribution of the assets was to place both parties on equal footing. The trial court held in part:

1. The parties were married approximately 28 years at separation and are both in their 70's, and are receiving Social Security Retirement incomes.
2. This is a long term marriage and with elderly litigants, the

Court looks to putting them both in similar financial positions for the rest of their lives.

3. Neither is likely, nor should they be required, to return to the work force in any regular capacity.

4. The parties both have no dependent children born of the marriage, though both have adult children.

5. The parties have acquired various items of property, both real and personal, which were of both separate, as well as community in character when the items were acquired.

In a dissolution action, the trial court must order a “just and equitable” distribution of the parties’ property and liabilities, whether community or separate. RCW 26.09.080. All property is before the Court for distribution. Farmer v. Farmer, 172 Wash.2d 616, 625, 259 P.3d 256 (2011). When fashioning just and equitable relief, the Court must consider (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 property distribution is to become effective. RCW 26.09.080. Larson v. Calhoun, 178 Wash.App. 133 (2013)

As stated above, these folks were married for 28 years and are both in their 70’s. *The principles of equity dictate they be put into positions that are roughly similar so they can live the remainder of their lives at a similar lifestyle.* The award of property as set out in the Court’s decision achieves the equitable end.

CP 116-119 (emphasis added).

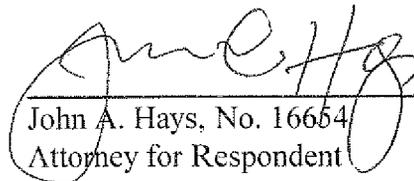
As the foregoing notes, in the case at bar the trial court carefully considered each of the factors required. This is what the trial court did in *Doneen*. Thus, in the same manner that the court affirmed the distribution in *Doneen*, so this court should affirm the distribution in the case at bar.

## CONCLUSION

Appellant's failure to assign error and cite to the record with sufficient specificity precludes review. In addition the trial court did not err in either its characterization of separate and community property, and it made a fair and equitable distribution of that property. As a result this court should affirm the decision of the trial court.

DATED this 24<sup>th</sup> day of May, 2017.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Respondent

## APPENDIX

### RCW 26.09.080

#### **Disposition of Property and Liabilities - Factors.**

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (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, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

### **RAP 10.3(a)**

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) Title Page. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) Introduction. A concise introduction. This section is optional. The introduction need not contain citations to the record for authority.

(4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(7) Conclusion. A short conclusion stating the precise relief sought.

(8) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**In re the Marriage of:**

**JUDITH LEE BURKS,**  
Appellant,

vs.

**WALTER G. BURKS,**  
Respondent.

**NO. 49576-7-II**

**AFFIRMATION OF  
SERVICE**

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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Respondent with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Joshua Baldwin  
Attorney at Law  
1700 Hudson St., Suite 300  
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2. Mr. Walter Burks  
Respondent  
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Dated this 24<sup>th</sup> day of May, 2016, at Longview, WA.

  
\_\_\_\_\_  
Diane C. Hays

**JOHN A. HAYS, ATTORNEY AT LAW**

**May 24, 2017 - 2:05 PM**

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