

FILED

FEB 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28845-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RODNEY S. LIGHT

APPELLANT

v.

ROBYN B. LIGHT

RESPONDENT

RESPONDENT'S BRIEF ON APPEAL

Brad L Englund, WSBA #14908
Dana P. Gailan, WSBA # 42907
Attorneys for Respondent

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ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the trial court abuse its discretion by awarding a disproportionate distribution to Respondent, Robin Light of 7.92% of the community estate?

ISSUE 2: Did the trial court abuse its discretion when it imposed a judgment lien on the real property that was awarded to Appellant, Rodney Light, in order to secure the cash payment of \$65,000.00 that Appellant was ordered to pay to Respondent?

ISSUE 3: Did the trial court error in finding that all of Appellant's accrued sick leave was community property?

ISSUE 4: Did the trial court error in finding that the value of Appellant's accrued sick leave was \$53,012?

STATEMENT OF THE CASE

Appellant and Respondent were married on August 5, 1995. (RP 9). During the marriage the couple accumulated community property valued at \$696,089. (CP 27) On January 17, 2010, a trial was held to determine the division of property. (RP 1, 3-7). Following trial, the trial court entered findings of facts and conclusions of

law. (CP 17-27). The trial court awarded to the husband, Appellant, certain items of community property having a value of \$357,899 (or 51.42% of the community property). (CP 27) The trial court awarded to the wife, Respondent, other items of community property having a value of \$338,190 (or 48.58% of the community property). (CP 27)

The trial court also entered a judgment against Appellant, requiring him to pay to Respondent the sum of \$65,000 in cash, to be paid within 2 years of the entry of the decree. (CP 14) Said sum was to accrue interest at 5% per annum. (CP 14) This cash award resulted in Respondent receiving a disproportionate distribution of 7.92% of the community property.¹ The trial court justified the disproportionate distribution because of the length of marriage, the ages of the parties, the economic circumstances of each party, and other factors. (CP 23 - 25).

Finally, the trial court ordered that the \$65,000 cash payment to Respondent be secured by a judgment lien on the real prop-

¹ With the cash award, Respondent will receive a total of \$403,190 of the community property. (CP 27) Thus, Respondent will receive 57.92% of the community property ($\$403,190 \div \$696,093$), or a disproportionate distribution of 7.92%.

erty awarded to Appellant. (CP 14)

ARGUMENT

Appellant makes two assignments of error. However, Appellant's argument actually addresses four separate issues: (1) whether the trial court should have awarded a 7.92% disproportionate distribution to Respondent; (2) whether the trial court should have imposed a judgment lien to secure a cash award; (3) whether a portion of the Appellant's accrued sick leave should have been treated as community property; and (4) whether the trial court erred in valuing the accrued sick leave at \$53,012. Each of these errors will be addressed separately below. None of Appellant's claimed errors have any merit. This Court should affirm the judgment of the trial court.

Appellant's statement of the case contains numerous factual assertions for which no citation to the record is provided. This violates RAP 10.3(a)(5), which states: "Reference to the record must be included for each factual statement." This failure to cite the record is prejudicial to Respondent. As the court noted in *Lawson v. Boeing Co.*, 58 Wn.App. 261, 271, 792 P.2d 545 (1990): "The failure to cite to the record is not a formality. It places an unaccepta-

ble burden on opposing counsel and on this court.” The Court should disregard all factual statements in Appellant’s statement of the case that are not supported by a citation to the record.

Finally, except for the findings of fact regarding the value and community property status of Appellant’s sick leave, Appellant has not challenged any of the finding of fact. Consequently, these finding are verities on appeal. *Magnuson v. Magnuson*, 141 Wn.App. 347, 351, 170 P.3d 65 (2007) (“Unchallenged findings of fact are verities on appeal”). Therefore, the only issue before this Court is whether the trial court abused its discretion by granting a disproportionate distribution based on its undisputed findings. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING A DISPROPORTIONATE DISTRIBUTION TO RESPONDENT

The first issue raised by Appellant is the disproportionate distribution received by Respondent. At the outset, it is important that the correct numbers are used. Appellant asserts that the entirety of the \$65,000 cash award to Appellant is the amount of the disproportionate distribution. That is simply not correct. Appel-

lant has the numbers wrong. The actual amount of the disproportionate distribution is \$55,145.50.

The Lights' community property had a combined value of \$696,089. (CP 27) The trial court awarded to Appellant community property having a value of \$357,899 (or 51.42% of the community property). (CP 27) The trial court awarded to the wife, Respondent, other items of community property having a value of \$338,190 (or 48.58% of the community property). (CP 27) To equalize the estate at exactly 50%, Appellant would have had to pay Respondent \$9,854.50². Thus, only \$55,145.50 of the cash award constitutes a disproportionate distribution³. This amount represents 7.92% of the total community property⁴. Thus, Respondent received a disproportionate award of 7.92%.

There is no question that the trial court has broad discretion when dividing property in a dissolution of marriage. *In re Marriage of Rockwell*, 171 Wn.App. 235, 242-243, 170 P.3d 572 (2007). The

² Total community property of \$696,089 ÷ 2 = \$348,044.50. \$348,044.50 minus property award to Respondent of \$338,190.00 = \$9,854.50.

³ \$65,000 – \$9,854.50 = 55,145.50

⁴ \$55,145.50 ÷ \$696,089 = 7.92%

Appellant has the burden of making a clear showing that the trial court abused its discretion. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (“Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion”); *State v. Wade*, 138 Wn.2d 460, 979 P.2d 850 (1999) (“A trial court’s judgment is presumed to be correct and should be sustained absent an affirmative showing of error”). Appellant has not met this burden.

A trial court’s division of property will be reversed only if there is a *manifest* abuse of discretion. *Rockwell, supra*. Such abuse of discretion occurs if the trial court’s decision is *manifestly* unreasonable, based on untenable grounds, or based on untenable reasons. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 369, 166 P.3d 667 (2007).

Appellant does not argue that the trial court’s decision was based on untenable grounds, or based on untenable reasons. Rather he simply argues that the decision was unreasonable. He states: “The real issue in the case at hand is the weight applied to the length of marriage.” Appellant’s Brief, p. 9. Notwithstanding this limitation, Respondent will address each of the three factors in

showing that the trial court did not abuse its discretion.

A. The Trial Court's Award of a Disproportionate Distribution was Based on Tenable Grounds and Tenable Reasons.

The trial court was very clear in stating the basis for its decision to award Respondent a disproportionate distribution of 7.92% of the community property. The trial court stated:

“The disproportionate award to the wife is appropriate, fair and equitable in light of the findings herein including, but not limited to her age, standard of living, and her economic circumstances after this dissolution.

The disproportionate award to the wife is also appropriate, fair and equitable in light of the husband's employment, employment opportunities, and standard of living.” (CP 25).

The findings of fact referred to by the trial court include the following findings:

- 2.2.1 This is a longer term marriage;
- 2.21.2 There is a significant difference in the parties' ages which impacts the wife's economic status and ability to provide for herself;
- 2.21.3 The husband is in the ascendency of his career, on a good career path, has a demonstrated successful job history, and has a stable job.
- 2.21.4 The wife has changed her life consistent with her age and the agreement between the parties. Also change in management at prosecutors office was a consideration in the parties decision re[garding] wife's employment.

- 2.21.5 When comparing the positions in their lives, the husband and wife are in different positions with the wife's position being limited and lower than the husband's position.
- 2.21.6 The wife's ability to secure employment is restricted by her age, requirements imposed by her Public Employees Retirement System Plan One (PERS 1) retirement, and short longevity of any possible job. The wife's career opportunities are negligible.
- 2.21.7 The wife's standard of living has decreased since the parties separated and is substantially lower than the husband's standard of living.
- 2.21.16 The husband's gross monthly income is three times the wife's monthly income. If the husband's job benefits are included, his monthly income exceeds three times [sic] the wife's monthly income.
- 2.21.18 The husband entered this marriage with limited assets (including some employment benefits and retirement). The wife entered this marriage with real estate.)
- 2.21.19 The husband will have substantially more value in assets than the wife when he retires.

(CP 23-25) Not one of these findings was contested by Appellant.

RCW 26.09.080 sets forth the factors the trial court should consider when disposing of the parties' property. The undergirding and overarching principal set forth in that statute is that the trial court shall "make such disposition of the property . . . as shall appear just and equitable after considering all relevant factors." The

statute then lists some of the possible relevant factors the trial court should 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 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.

In awarding the disproportionate distribution the trial court fully complied with the requirements of RCW 26.09.080. It considered all of the stated statutory factors: (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 property is to become effective. RCW 26.09.080. In addition, it considered other factors such as “the health and age of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities, their foreseeable future acquisitions or efforts of one or both of the spouses.” *In re Marriage of Oli-*

vares, 69 Wn.App. 324, 329, 848 P.2d 1281 (1993); *see also In re Marriage of Zahm*, 138 Wn.2d 213, 218, 978 P.2d 498 (1999).

Appellant has not shown, and cannot show, that the trial court based its disproportionate award on an untenable ground or on an untenable reason. The only basis Appellant relies upon in asserting that the trial court abused its discretion is that the award was unreasonable. Appellant's argument has no merit.

B. The Trial Court's Award of a Disproportionate Distribution is not *Manifestly Unreasonable*.

Appellant's real complaint with the disproportionate award "is the weight applied to the length of marriage." Appellant's Brief, p. 9. Appellant focuses on that single factor as if that one factor is controlling of the issue. It is not.

The Supreme Court has stated that no single statutory factor has greater weight as a matter of law. The trial court should weigh all relevant factors, within the context of the parties' circumstances, to arrive at a just and equitable division of property. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985), *cert denied*, 473 U.S. 906 (1985).

Appellant draws a distinction between a long term marriage

of 25 years or more, and all other marriages. The case law does not support Appellant's bright line analysis.

In *In re Marriage of Rockwell*, 141 Wn.App. 235, 243, 170 P.3d 572 (2007), the court stated:

"The longer the marriage, the more likely a court will make a disproportionate distribution of the community property."

This case speaks of a gradient analysis, not of a bright line. The longer the marriage, the more likely a disproportionate distribution.

Curiously, Appellant quotes this very language in his brief. However, he completely ignores its implications.

The trial court entered a specific finding of fact that this was a "longer term marriage." (CP 23) That finding has not been challenged on appeal. Therefore, it is a verity.

The term of the marriage is but one factor. Appellant fails to quote additional language from *Rockwell* that bears on the issue. Immediately following the above-quoted language, the court in *Rockwell* stated:

"Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property."

Rockwell, supra. Other than ill-health, these factors are all present in this case. The trial court entered specific findings stating: (i) that there is a significant difference in the parties ages, which impacts the wife's economic status and ability to provide for herself (Finding 2.21.2, CP 23); (ii) that the wife's ability to secure employment is restricted by her age and the requirements imposed by her retirement plan, and the short longevity of any possible job (Finding 2.21.7); (iii) the wife has taken early retirement (Finding 2.21.11) pursuant to an agreement with the husband (Finding 2.21.4), and this early retirement was a benefit to the marital community (Finding 2.21.11); the wife's career opportunities are negligible (Finding 2.21.6); the husband's gross monthly income is more than three times the wife's monthly income (Finding 2.21.16); the husband is in the ascendancy of this career, on a good career path, and has a stable job (Finding 2.21.3); the wife's standard of living has decreased since the parties separated and is substantially lower than the husband's standard of living (Finding 2.21.7); and the husband will have substantially more value in assets than the wife when he retires (Finding 2.21.19).

None of these findings were challenged. They support the

trial court's determination. Appellant has not shown that the 7.92% disproportionate distribution was "manifestly unreasonable."

Appellants single-minded focus on the 12 year versus 25 year marriage issue ignores the fact that the trial court is required to consider all relevant factors. Length of the marriage is only one factor. The trial court is required to consider all relevant factors. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985), *cert denied*, 473 U.S. 906 (1985) ("This court will not single out a particular factor . . . and require as a matter of law that it be given greater weight than other relevant factors"). When all relevant factors are considered, Appellant has not "clearly shown" that the trial court abused its discretion.

As a final point, Appellant begins his argument with an "aside note," wherein he states, "it appears that the court may have intended to award husband his ICMA retirement account as it did in the spread sheet and then award wife one-half of that account by way of the \$65,000." Appellant's Brief p. 8. Appellant provides no evidence or citation to the record in support of this argument. It is speculation at best, and should be disregarded by the Court.

Furthermore, the court's award of a judgment lien to secure

the \$65,000 payment, and the 2-year payoff period clearly shows that the court did not intend to award one-half of the retirement account to the wife.

Finally, Appellant's speculation is merely a coincidence of numbers—a coincidence that does not exist when the actual amount of the disproportionate distribution (i.e., the \$55,145.50) is considered. That amount does not correlate in any way to the ICMA retirement account.

Appellant's discussion of the ICMA account is simply a red herring to confuse the court and draw its attention away from the relevant factors the trial court considered when it made its "just and equitable" division of the property.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED A JUDGMENT LIEN ON THE REAL PROPERTY THAT WAS AWARDED TO APPELLANT

Appellant argues that the trial court abused its discretion when it granted a judgment lien to secure the \$65,000 payment. He argues that Respondent never asked for such a reward at trial. Appellant provides no authority to support his argument.

The trial court has authority to award a spouse a lien se-

cured by property awarded to the other party. *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 433 P.2d 209 (1967); *Bailey v. Bailey*, 142 Wash. 359, 253 P.121 (1927); *Pollock v. Pollock*, 7 Wn.App. 394, 499 P.2d 231 (1972). “The power to impose such a lien arises from the court’s inherent authority to make its judgments effective.” *Northern Commercial Co. v. E.J. Hermann Co.*, 22 Wn.App. 963, 968, 593 P.2d 1332 (1979).

There is little doubt that the trial court has the ability and authority to award a lien in order to secure a cash payment. Appellant can hardly claim he was unaware of that authority. Appellant asked that the court enter a lien in his favor in the amount \$100,000. (RP 148). Clearly, he was aware of the trial court’s ability.

Appellant argues that the lien was improper because it was not asked for by Respondent. That argument is without merit for several reasons. First, had Respondent received what she had asked for, she would not have needed a lien. She had no need for the lien until the trial court determined several issues against her. (See Finding 2.21.14)

Second, essentially, Appellant is arguing that the trial court

does not have authority to exercise its “inherent authority to make its judgments effective” unless a party specifically asks for the remedy. Appellant cites no support for this novel proposition. Respondent could not find any support for the argument either.

Once the trial court determined that Appellant was to pay \$65,000 to Respondent, the trial court simply put into place a mechanism designed to enforce that obligation. Even if the lien were removed, the obligation to pay the \$65,000 would still remain. The lien really does not change Appellant’s circumstances. He will still owe the money. The lien only ensures that Appellant will comply with the trial court’s order. What Appellant is seeking is a way to avoid having to pay the \$65,000. The trial court acted appropriately. It insured that the property division it awarded is the property division that will actually occur.

Third, Appellant is arguing that the trial court does not have discretion to take certain action, unless a party specifically asks for that action. The trial court’s discretion is not so limited. The only limitation on the trial court’s discretion under RCW 26.09.080 is that the result be just and equitable. Imposing the lien is just and equitable. Appellant has not shown that the trial court abused its

discretion.

The Appellant argues that the trial court's imposing of the lien without request "destroys our system of justice, the due process of notice in a 'notice pleading state' and otherwise undermines the credibility of the court." Appellant's Brief, p. 11. If such harms arise from the trial court's actions, they are general harms only. Appellant does not show any harm to himself. His injury, if any injury exists, is *injuria absque damno*.

Appellant does not say how he was personally prejudiced by the trial court's imposition of a lien without first being requested by Respondent to do so. He has not shown that he would have acted differently, had Respondent first asked for the lien. He clearly was aware that such a procedure was possible. Appellant has not made a "clear showing" that the trial court abused its discretion by imposing the lien.

POINT III

THE TRIAL COURT DID NOT ERROR IN FINDING THAT ALL OF APPELLANT'S ACCRUED SICK LEAVE WAS COMMUNITY PROPERTY

In his Assignment of Error #2, Appellant states: "The trial court erred in concluding that husband's accrued sick leave was all

community property for purposes of division.” Appellant’s Brief, p. 1. Appellant amplifies his claim of error by stating that “the trial court abused its discretion in dividing the total amount of husband’s accumulated sick leave benefits without characterizing those benefits that existed prior to marriage as husband’s separate property.” Appellant’s Brief, p. 2. It appears that Appellant is assigning error to portions of the following finding of fact:

2.21.9 Any vacation, sick leave, comp time and longevity time accrued by husband as of the date of marriage does not justify a reduction to the amounts established at the date of separate and used for valuation purposes herein due to the length of marriage and the use of those benefits in the ordinary course of husband’s employment during the marriage.

(CP 24)

The standard for reviewing a finding of fact is whether a finding of fact is supported by substantial evidence. “In Washington, findings of fact supported by substantial evidence will not be disturbed on appeal.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.*

The starting point in this inquiry is the presumption that all

property of the couple at the end of the marriage is community property. The law characterizes property as community property unless there is clearly no question of its separate character. *In re Marriage of Davison*, 112 Wn.App. 251, 258, 48 P.3d 358 (2002). This presumption supports the finding of fact. Nothing further is needed.

The presumption of community property can be rebutted only by showing the assets were acquired as separate property. *In re Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002). Further, the presumption must be rebutted by clear and convincing evidence. *In re Marriage of Janovich*, 30 Wn.App. 169, 171, 632 P.2d 889 (1981).

There is no question that Appellant came into the marriage with some employment benefits and retirement. However, the extent of those assets were limited. Finding 2.21.18 specifically states: “The husband entered this marriage with limited assets (including some employment benefits and retirement).” (CP 25). Appellant has not challenged this finding. Accordingly, it is a verity on appeal – the extent of his pre-marriage sick leave was limited.

According to Appellant’s testimony, he accumulated substan-

tial sick leave prior to the marriage. Specifically, he states, “I had around 700 to 800 hours, somewhere in there.” (RP 41). However, there is no finding as to that amount or any other amount—other than the amount he came into the marriage with was “limited.” Consequently, the lack of a finding on Appellant’s testimony is deemed to be a finding against him. *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983) (“No finding as to a material fact constitutes a negative finding”).

Appellant’s testimony on this issue was less than convincing. When asked if he had any documents to substantiate his claim of the amount of pre-marriage benefits, he responded by saying, “not with me I don’t.” (RP 42). Furthermore, he stated, “I’m going off my memory.” (RP 42). He admits that memory can be faulty. (RP 43) Other than Appellant’s memory that he had accrued 700 to 800 hours of sick leave, there was no other evidence supporting this claim.

Appellant was asked if he could get some documentation during lunch time to prove his claim. He responded, “I could.” (RP 42). However, no documentation was ever provided to the trial court confirming his testimony. (RP 143)

Appellant's unsubstantiated testimony does not rise to the level of clear and convincing evidence to rebut the presumption that all of his sick leave at the end of the marriage was community property. He has not set forth sufficient evidence to challenge the finding.

Appellant does not challenge the trial court's finding that Appellant used those benefits during the marriage. (Finding 2.21.9, CP 24). Indeed, he admits that he used some sick leave during the marriage. He testified:

"At the time, going back and looking at my paperwork with the city here recently, I think I had about 750 hours, 800 hours of sick leave at the time that we were married. At the time we separated, there was about 1100, 1200 hours. So I picked up – obviously I had some illness and had taken some time off during that time. So in looking at it, I'm guessing it's probably 500 hours."
(RP 11)

One thing is clear from this testimony, Appellant is not sure of the numbers. He "thinks" he had about 750 – 800 hours of sick leave at the time of marriage. He admits using some of the pre-marriage sick leave during the marriage. He does not state how much. He is "guessing" that the net increase in sick leave during the marriage is "probably 500 hours."

Appellant's claim of error represents a fundamental misun-

derstanding of community property law. This can be seen through several simple examples. If Appellant came into the marriage with no accrued sick leave, and at the end of the marriage had 10 hours of accrued sick leave, no one would dispute that the 10 hours of sick leave was community property. *In re Marriage of Marzetta*, 129 Wn.App. 607, 618, 120 P.3d 75 (2005). Now, instead, if Appellant came into the marriage with 10 hours of accrued sick leave, used those 10 hours during the marriage, and accrued an additional 10 hours during the marriage, the additional 10 hours he accrued during the marriage would still be community property. He would not be entitled to treat the 10 hours accrued at the end of the marriage as being the same as the 10 hours accrued at the beginning of the marriage. Those are not the same 10 hours.

Appellant admits using “some” of the hours. (RP 11) However, he does not state how much he used. He “guesses” that the increase from pre-marriage to post-marriage was “probably 500 hours.” Given the dearth of evidence regarding the number of pre-marriage sick leave used during marriage, the trial court was correct in finding that “due to the length of marriage and the use of those benefits in the ordinary course of the husband’s employment

during the marriage,” there would be no reduction for pre-marriage sick leave. (Finding 2.21.9) This finding is wholly supported by *In re Marriage of Davison*, 112 Wn. App. 251, 258, 48 P.3d 358 (2002), in which the court stated: “The law favors characterization of property as community property unless there is clearly no question of its separate character.” (Internal quotation marks omitted.) Here, there is a question of its separate character.

Even if Appellant had shown the exact amount of pre-marriage accrued sick leave, and the exact amount of sick leave used during the marriage, that evidence would still not establish the separate character of a portion of the post-marriage sick leave. Again, a simple example will illustrate this. Suppose Appellant had 10 hours of sick leave accrued prior to the marriage. During the marriage he chose not to use the sick leave, and at the end of the marriage had 10 hours of accrued sick leave. The 10 hours are still not separate property. By choosing to work during the marriage, rather than use the sick leave, Appellant used his community labor to maintain the value of that pre-marriage sick leave. Accordingly, his community labor is adding a benefit to Appellant, and that benefit must, of necessity, be community in nature. The longer

the marriage, the more of the pre-marriage sick leave that will be converted into community property because of the labors of the husband during the marriage. The trial court recognized this principal by referring to the length of the marriage and the use of the sick leave benefits in the ordinary course of the husband's employment during the marriage. (Finding 2.21.9, CP 24)

In addition, at trial Appellant testified that he and Respondent entered into a community property agreement during their marriage. When asked, "are you taking the position that you have a community property agreement which has converted all of the separate property to community property." (RP 49). Appellant responded, "I think that's what the intent of it was." (RP 49). By Appellants own admission the purpose of the signed community property agreement was to convert their individual separate properties into community property. That is sufficient to support the trial court's finding.

If Appellant's testimony regarding the community property agreement is true, then all property before the court was community property, including the \$53,012 in accumulated sick leave. Thus, the court's characterization of Mr. Light's sick leave was correct and

supported by Mr. Light's own admission that the parties had a community property agreement, which left them with no separate property.

Finally, even if the court mischaracterized the accrued sick leave, the mischaracterization is not necessarily reversible error if the distribution is, on the whole, fair and equitable. *In re Marriage of Washburn*, 101 Wn.2d 168, 177, 677 P.2d 152 (1984). Remand is only required where (1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way. *In re Marriage of Shannon*, 55 Wn.App. 137, 142, 777 P.2d 8 (1989).

As argued above, the trial court's division was based on several factors in addition to the character of the property: the length of marriage, the economic circumstances of the parties, the ages of the parties, the standard of living of each party and their prospects of future earnings. There is no indication in the record that the court's division was significantly influenced by the character of the property, nor is there any evidence that the court would have divided it differently had the property been characterized as separate

property. It is important to remember the characterization of property as separate or community is one factor that the court considers; however it is not controlling. *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977). Therefore, based on the other factors considered by the court when it made its “just and equitable” division the supposed mischaracterization was harmless and is not reversible by this court.

The appellant’s argument that the trial court alleged mischaracterization was a manifest abuse of discretion and worth a remand is completely unjustified. First, clear and convincing evidence was not provided to rebut the community property presumption. The only evidence provided was Appellant’s rather unsure testimony. Second, according to Appellant the parties had a community property agreement which converted all their separate property to community property. Third, even if it was mischaracterized, the trial court considered other factors justifying its inclusion in the final distribution.

POINT IV

THE TRIAL COURT DID NOT ERROR IN
FINDING THAT THE VALUE OF APPELLANT'S
ACCRUED SICK LEAVE WAS \$53,012

Appellant also challenges the trial court's finding that the value of the accrued sick leave was \$53,012. The specific Finding that he challenges is:

2.21.10 The valuation of husband's accrued vacation, sick leave, comp time and longevity time is dollar for dollar because the husband can fully use them during the course of his employment. Husband may have the choice of 'cashing out' these benefits on a \$4 to \$1 ratio, but he is able to use them on a \$1 to \$1 basis in the course of his employment so they should be valued as set forth in Exhibit A hereto.

The Appellant claims that because he can "cash in" his sick leave at a at a 4 to 1 ratio, his sick leave should be valued at 25 cents on the dollar, rather than on a 1 to 1 ratio. This argument has no merit.

The valuation of property is a question of fact. *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). This court will not reverse findings of fact supported by substantial evidence in the record. *Id.*

There is no dispute that the total value of the sick leave was

valued at around \$53,000. (RP 11). Appellant admitted this value in the following colloquy at trial:

Q. Okay. The spreadsheet shows \$53,000. Is that what your sick leave accumulation is worth right now?

A. I think Robyn is using that at the time of separation. At the time it could have been. **That would have been the total value.** That's not the cashout value.

Q. I see.

A. The cashout value is a quarter, one for four, 25 percent of that. (RP 11) (Emphasis added.)

Appellant clearly admits that the "total value" of the sick leave is around \$53,000, and that the "cashout" value is one-fourth that amount.

The trial court recognized the distinction between total value and the cash-out value. See Finding 2.21.10. However, the court found that Appellant can use the sick leave on a one for one basis in the course of his employment. That finding was not challenged by Appellant.

The court awarded Mr. Light all his sick leave. It did not require him to cash it in. When it entered its findings of fact and conclusions of law it said, "the valuation of husband's accrued vacation, sick leave...is dollar for dollar because the husband can fully use

them during the course of his employment. Husband may have the choice of 'cashing out' these benefits on a \$4 to \$1 ratio, but he is able to use them on a \$1 to \$1 basis in the course of his employment." (CP 24).

That Appellant would receive a lower value if he cashed in the sick leave does not change its true value to him. This he admits by agreeing that \$53,000 is the "total value" of the sick time.

The court's finding of fact that the sick leave's total value is \$53,012 is supported by Appellant's own testimony. (RP 11). This Court should not reverse the trial court's findings.

POINT V

RESPONDENT SHOULD BE AWARDED HER ATTORNEY FEES FOR DEFENDING THIS APPEAL

According to RCW 26.09.140 and RAP 18.1, "upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." Thus, it well within the court's discretion to order Appellant to pay Respondent's attorney fees for defending this appeal.

Currently, Appellant has a very good paying job and is in the

ascendency of his career. (CP 23). According to Appellant he made \$9,200 a month at the time of trial. (RP 9). Due to Appellant's substantial wages there is little doubt that he has the ability to pay Respondent's attorney fees.

On the other hand, Respondent's financial circumstances and standard of living have decreased significantly since she and Mr. Light separated. (CP 23). At trial Respondent testified that she retired in 2004, with the approval of her husband. (RP 53). She stated, "he [Mr. Light] wanted me at home, wanted me available to be at the house." (RP 53). Therefore at the insistence of Appellant, Respondent retired from her job of 24 years with the Yakima County Prosecutor's Office. At the time of trial she was getting about \$2,700 a month from her retirement benefits. (RP 54). In addition, her job with the Department of Correction cut her hours from 1,500 a year to 867 hours a year, due to budget cuts. (RP 55). She has tried to supplement her retirement income but has been unsuccessful due to the current economic environment. (RP 55-59). The trial court said Ms. Light's age has impacted her economic status and ability to provide for herself. (CP 23).

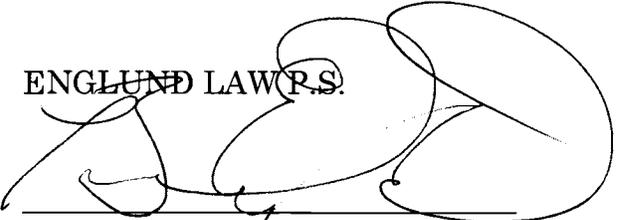
It is uncontroverted that Appellant grosses three time what

Respondent earns each month. (CP 24). That if his job benefits are included, his monthly income exceeds three times Respondent's income. (CP 24).

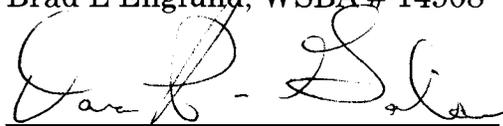
Upon an appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs. Appellant has the ability to pay Respondent's attorney fees, whereas Respondent is struggling to support herself. Appellant should be responsible for Respondent's attorney fees accrued in the defense of this appeal.

RESPECTFULLY SUBMITTED this 23rd day of February, 2011.

ENGLUND LAW P.S.



Brad L Englund, WSBA # 14908



Dana P. Gailan, WSBA # 42907
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Respondents' Brief to Appellant's attorney, Robert Velikanje, at 132 North 1st. Ave., Yakima, Washington, 98902, postage prepaid, on February 23, 2011.



Julie Queen