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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III**

In re the Marriage of:

JANICE GAI GREEN, Petitioner-Appellee

and

HAROLD J. GREEN, Respondent-Appellant

NO. 288587-III

APPELLANT'S REPLY BRIEF

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I. REPLY TO RESPONDENT'S COUNTER-STATEMENT OF
ISSUES PRESENTED

Response to the "Procedural Infirmities": Failure to Comply with RAP 10

Each counter-issue presented in Mrs. Green's response includes her contention that Mr. Green has failed to assign specific errors in the manner as required by RAP 10.3(a) (4), 10.3(g), and 10.4(c) to either (a) the Oral Ruling [CP 165-193], or to (b) the written Finding of Fact and Conclusions of law [CP 194-202] and Decree of Dissolution [CP 203-208] entered February 1, 2010. As a result of this failure, Ms. Green concludes that the factual determinations of the superior court now must be considered verities on appeal and the established facts of the case, citing *Wilson v. Elwin* and *State v. Ross* as the authority for this conclusion. *Wilson*, 54 Wn.2d 196, 338 P.2d 762 (1959); *Ross*, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000). However, this argument merely asserts that Mr. Green's brief fails to comply with the requirements, without any explanation.

Mr. Harold "Bud" Green maintains he has met all of the requirements of RAP 10. He has filed his Notice of Appeal [CP 209-225] with both Findings and Decree attached, and specifically listed the entire

Findings of Fact and Conclusions of law as well as the relevant paragraphs 3.2, 3.3, 3.4, 3.5, 3.7, and 3.15 of the Decree of Dissolution. Moreover, contrary to Mrs. Green's assertion, Mr. Green's brief is consistent with RAP 10.3(a)(4) as it clearly set forth the specific assignments of error, identified those findings of fact which the court erred in addressing and the related issues, and further referenced these assigned errors by number as required by RAP 10(g) and its subsections.

Mrs. Green misinterprets the court in *Wilson* and in *Ross*, in her conclusion that as a result of a procedural failure in the attempt to comply with RAP 10.3 and 10.4, the factual determinations of the superior court must be considered verities on appeal. However, neither court draws this strict conclusion. Although the court in *Wilson* was silent as to the specifics of what was included in the appellants' brief in that case, the court in *State v. Ross* addressed the defendant's brief in light of the procedural aspects of RAP 10.3. *Wilson*, 54 Wn.2d 196, 338 P.2d; *Ross*, 762 141 Wn.2d 304, 4 P.3d 130. In *Ross*, the court relied on the reasoning of the court in *State v. Olson* to explain the difference between an unchallenged fact, which cannot be reviewed on appeal, and a fact that is clearly challenged on appeal, but technically flawed in its compliance with the RAP 10.3. *Ross* at 311, 4 P.3d at 134; *Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). The court in *Olson* squarely addresses Mrs. Green's procedural issue:

[I]t is clear from the language of RAP 1.2(a) and the cases decided by this court that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. *In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced; there are no compelling reasons for the appellate court not to exercise its discretion to consider the merits of the case or issue.* 126 Wn.2d 315, 893 P.2d 629 (1995). (Emphasis Ours)

RAP 1.2(a) states:

These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions of rule 18.8(b).

Mr. Green's brief states each assignment of error together with the issue pertaining to the error at the beginning of his brief as well as in each separate argument. The nature of the appeal is clear and the issues are apparent, so that the court is not inconvenienced and, absent Mrs. Green's explanation of how she may be prejudiced, the respondent is not prejudiced, thus, there is no compelling reason not to consider the merits of the case.

Response to the "Substantive Issues"

Next, Mrs. Green claims Mr. Green failed to follow RAP 10.3(a) (4) and use form 6 from the Appendix of Forms which contains a separate section for "Issues Pertaining to Assignments of Error." On that basis, Mrs. Green attempts to submit her own counter-statement of substantive

issues present in this appeal, taking into account Mr. Green's stated assignments of error. However, RAP 18.10 specifically states "a person may use any form which substantially complies with these rules. *The forms in the Appendix are only illustrative.*" (Emphasis Ours). Overall, it is evident that in the circumstance where an appellant fails to assign error and define issues as required by RAP 10.3, but their challenge was clear; the court is to decide the case on its merits. *Olson*, 141 Wn.2d 304, 4 P.3d 130; *Podiatry Ins. Co. of America v. Isham*, 65 Wn. App. 266, 828 P.2d 59 (1992).

II. REPLY TO RESPONDENT'S COUNTER-STATEMENT OF THE CASE

Mr. Green would offer his statement of the facts and case as accurate and submit there is no reason to restate the facts. Mr. Green also challenges and objects to the accuracy of the allegations noted in Mrs. Green's Counter-Statement, pages 4-12. Mr. Green objects to Mrs. Green's Procedural History (page 8, paragraph 2) which starts off with an allegation of infidelity which is totally inappropriate, irrelevant, and is intended to incite sympathy or favor from the court. Marital misconduct is irrelevant. RCW 26.09.080; *Marriage of Urbana*, 147 Wn.App.1, 195 P.3d 959 (2008). It has no evidentiary value.

When possible, Mr. Green will attempt to address/ coordinate his Assignments of Error and Mrs. Green's Counter Issues.

Counter Issues NO. 3 and 5 / Assignment of Error #1: Lack of Jurisdiction Over the GFLP and Senior Trusts and Mr. Green's Interest

Mrs. Green asks “was the court obligated to include the GFLP and Senior Trust as parties before it could value Mr. Greens’ separate interest in the GFLP?” The issue is whether *the court had jurisdiction to address issues pertinent to the GFLP and Senior Trust when GFLP and the Senior Trust were not parties.*

Mr. Green pointed out on page 20 of his brief, that neither the Green Family Partnership (GFLP), Senior Trust (1995 Trust), nor Bonnie Green were made parties to the dissolution action, yet the court continued to reference Mr. Bud Green’s interest in his mother’s trust, citing Findings of Fact NO. 5, 6, 7, and 23 and his position as Trustee. Mr. Green challenged the basis for these Findings of Fact. Mr. Green also raised the issue in Assignment #4, *whether the court erred in considering Mr. Green’s interest in the Senior Trust when making a fair and equitable division of assets.* Following the specific assignment of error, Mr. Green referenced each Finding where the court erred and followed that with his arguments. However, in regards to jurisdiction, no finding was entered by the court.

Mr. Green’s arguments are not “nonsensical” and do not present a “non-issue” in terms of the parameters of the trial court’s decision. Rather, they challenge the court’s jurisdiction and point to it going beyond

its authority in deciding the issues of this dissolution of marriage as between these parties.

Contrary to Mrs. Green's statements in her counter issue, the cases cited by Mr. Green are on point. In *Marriage of McKean*, the parties had set up an irrevocable trust for their children during their marriage. 110 Wn. App. 191, 38 P.3d 1053 (2002). The Court of Appeal reversed the trial court's direction that the children's trust property be transferred to a corporate trustee, and rejected the reasoning that the trial court believed it had the responsibility to protect the financial assets of the children. *Id.* at 196, 38 P.3d at 1055. The court stated that trial court's jurisdiction over dissolution actions comes from statute, specifically RCW 26.09.080, which requires the trial court to divide the parties' assets; thus, the court held that the trial court did not have authority to adjudicate rights of parties not before the court, even if they had an interest in the property at issue. *Id.* at 196, 38 P.3d at 1055; see *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951).

Similarly, the court here also lacked jurisdiction over the Senior Trust and GFLP and erroneously used Mr. Green's interest in the separate entities as a basis for its decision. The court in *McKean* also stated that trustees at issue were third parties who held legal title to the property and were subject to equitable and fiduciary obligation to manage or use the property for the children's benefit. *Id.* at 196, 38 P.3d at 1055. Therefore, the court reasoned that even if Mr. and Mrs. McKean served as trustees,

they were not parties to the dissolution action in their representative capacities. *Id.* at 195, 38 P.3d at 1055; *Marriage of Morrison*, 26 Wn. App. 571, 613 P.2d 557 (1980); see also, *Marriage of Petrie*, 105 Wn. App. 268, 19 P.3d 443 (2001) (where a dissolution action was consolidated with a suit to remove the father as trustee).

Here, the court's jurisdiction under RCW 26.09.050, .080 governs the parties' property, whether separate or community. Mrs. Green sought dissolution of the marital relationship and as a result there was a distribution of assets in the revocable Junior Trust of 1998. However, the court's jurisdiction does not extend to the GFLP and Senior Trust. Nor did it govern Mr. Green's interest as a fiduciary trustee or contingent beneficiary in the Senior Trust because, like the parties in *McKean*, he was not a party to the action in this capacity. *McKean* at 195, 38 P.3d at 1055; *Arneson*, at 102, 227 P.2d at 1018.

Despite the lack of authority by the court over the Senior Trust, Mrs. Green re-iterates in her Counter-issue no. 4 that believed she was entitled a portion of it and introduced information of the Senior Trust and GFLP in support. [RP 343, lines 1-18, RP 344, lines 9-21, RP 345, lines 1-12]. Mrs. Green also argued the shares gifted to Mr. Bud Green in the GFLP were community property. She alleged, testified, and attempted to show that the ten acres that was exchanged for 2,342 of Bud Green's shares in the GFLP were also community property. She argued that the Senior Greens made annual gifts to each of their sons, daughters-in-laws,

and grandchildren, that she was entitled such gifts, and that Bud Green acted improperly once he stopped gifting to her and himself after she filed the dissolution action simply because he had the unlimited authority to make gifts or loans to himself and to whomever he chose. [page 9, Response Brief] Furthermore, Mrs. Green contends that although he was entitled to receive compensation for his services from the Senior Trust for managing his mother's trust and assets, Mr. Green chose not to do so. [RP 250-51, 252, 430]. Overall, her argument is based only upon Mr. Green's access to unlimited funds, all of which belonged to the Senior Trust.

The trial court referenced the Green Family Partnership (GFLP) and the Senior Trust in its Findings of Fact, [CP 194-202] and in the Oral Ruling, [CP 165-193]. It stated in Finding of Fact NO. 5[CP 195] "it is appropriate for Mr. Green to retain his interest in the 1995 Green Family Trust. Mr. Green is in a unique management position. He has almost unlimited discretion with regard to paying himself or not paying himself, taking money only as a loan versus a gift. The court recognizes his separate interest." (Emphasis Ours).

But, Mr. Bud Green's interest in the Senior Trust was one of a future beneficiary interest. So long as his mother was alive, he was the trustee. His beneficiary interest was a mere expectation. A mere expectation does not rise to the level of property right divisible in a dissolution proceeding. *Marriage of Leland*, 69 Wn.App.57, 847 P.2d 518, review denied 121 Wn.2d 1033, 856 P.2d 383 (1993). Although he

did have unlimited discretion as authorized to administer the Senior Trust, per the First Amendment to the Senior Trust [EX R-141, at page 7] Mr. Green had authority to not make distributions, including in the event of “a pending marital separation or dissolution of marriage or divorce of the beneficiary.” Mr. Green acted properly within his authority in stopping any gift to Mrs. Green and himself.

The court’s consideration of any future beneficial interest as well as its consideration of his fiduciary authority in the Senior Trust and Green Family Limited Partnership was error and abuse of its discretion. *McKean*, 110 Wn. App. 191, 38 P.3d 1053; *Arneson*, 38 Wn.2d 99, 227 P.2d 1016. The mere fact that Mr. Green exercised certain discretion in administering the Senior Trust was an insufficient basis for the court to direct Mr. Green reach into the Senior Trust.

However, Mrs. Green argues that there is no evidence the court took into consideration the factors of him being a beneficiary of his mother’s living trust, or his capacity of him being a trustee when framing the distribution of assets and liabilities. But, Mrs. Green then cites Finding of Fact NO. 5 which explicitly discusses the court’s consideration. Finding of Fact NO. 5 [CP 195] and the court’s Oral Ruling [CP 177, line 2] states “I am satisfied that the Green Partnership and the parent’s trust are not community assets but the court must consider community property and separate property.” The court then values the husband’s interest in the GFLP shares without any explanation; but states “a lot of that may be only

expectancy. There is revocable potential for all of this, but mother Bonnie is not likely to be changing what appears to be fairly set lines of distribution there. Nonetheless, I recognize that this is not etched in stone for him either.” Additionally, the Oral Ruling [CP 180, lines 8-10] also contains the court’s comments regarding the GFLP: “it is his separate property, but I am recognizing its access is at his fingertips and at his discretion.” Also in the Oral Ruling [CP 181, lines 1-13], the court again makes the statement “[h]e has adequate resources to pay those from non-family resources” when referring to retaining Mr. Green’s minority interest in the GFLP, and providing for a transfer payment.

Clearly, the court did take into consideration the GFLP and Senior Trust and its provisions. It also discussed the same when addressing the issue of the residence. [See Findings of Fact 6-7, CP 195-196]. The court’s comments regarding Mr. Green’s access to any funds continuously referenced his access to the Senior Trust monies therein, thus, the court improperly characterized the Senior Trust as property divisible by the court.

Counter Issue NO. 4 & Assignment of Error #2 and #3: Expert Testimony and Failure to Properly Value Mr. Green’s Partnership Interest

Assignment of Error #2 argues the court erred in its valuation of Bud Green’s interest in the Green Limited Partnership shares at \$481,275.00, which the court found the interest to have been transferred to his (Bud Green and Janice Green’s) family trust of 1998--the Junior Trust.

[CP 197, Findings of Fact NO.14] It also found this interest (reflected by shares) to be his separate property. [CP 195, Findings of Fact NO. 5].

Mrs. Green, in her Counter Issue NO.4, posed the question as to *whether the court erred in allowing Mr. Sherwood testify as to the value of the parcels of land encompassing assets of the GFLP.*

The Senior Trust and Green Family Limited Partnership (GFLP) were not parties to this action, yet Mrs. Green sought to have all of the real property of the Senior Trust and GFLP valued because, by her own testimony, she believed she was entitled a portion of the Senior Trust. [RP 344, lines 9-21] She hired Mr. Dewitt Sherwood to provide a market analysis of the entire nine (9) pieces of property. [CP 44-47, 59-60, 68, EX 12] She made no attempt to value Bud Green's minority interest. [RP 54-57].

Mr. Green objected to the market analysis and Mr. Sherwood's credentials. [RP page 54-61] Of note, Mr. Sherwood testified he was a general appraiser, differentiated between an appraisal and market analysis, acknowledged he had experience valuating limited partnerships and minority interests in limited partnerships, was experienced in discounting of minority interests and discounting the marketability of limited minority interests in limited partnerships, however, he acknowledged that he was not asked to do any of these types valuations or analysis. Nor was he advised by Mrs. Green or counsel that she held any interest in the GFLP. [RP 54-57] She did not disclose the Mr. Bud Green's minority limited

interest. [RP 69, lines 1-4]. She also failed to disclose to Mr. Sherwood the terms of the GFLP and Senior Trust, which included Bud Green's parents' interest in the farmland and which they directed was not to be sold until January, 2020 or such time as their sons agreed to sell the farmland in the Senior Trust. [EX R141, page 3, RP 198-200, EX 136, page 3 Para. 2.2, page 13] She simply did not provide Mr. Sherwood proper information for him to value Bud Green's minority limited partnership share. Her intent was to value the entire Senior Trust and GFLP as real property.

On voir dire, Mr. Sherwood acknowledged he was not a MAI appraiser [RP 55, lines 1-5] and that the document intended by him was not intended as an appraisal but a market analysis of the entire nine (9) parcels owned by GFLP and Senior Trust [RP 56, lines 1-5] because he was simply asked to value parcels. Therefore, his analysis was an inaccurate and incomplete basis for valuation by the court as evidenced by Mr. Sherwood's own testimony that trying to establish the share value is not as simple as taking the number of shares and dividing them into the value of the property. [RP 69 lines 1-12].

Although a market analysis may be admissible under limited circumstances, RCW 18.140.020(5), the court did not address those statutory requirements. Thus, allowance of the market analysis and Mr. Sherwood's testimony was error because it reflected only the value of the

Senior Trust and entire real estate of the GFLP, but not any interests held by the parties.

Additionally, Mrs. Green asserts her procedural argument that Mr. Green did not point to the court's specific finding in regards to Mr. Sherwood or his credentials. However, this could not be done because the court failed to make any findings concerning Mr. Sherwood.

In support of Mr. Sherwood's testimony and credentials, Mrs. Green, citing the court in *Miller v. Likins*, states that under Rule 702 of the Washington Rules of Evidence ("ER"), the court has broad discretion when determining qualifications of an expert witness. *Miller*, 109 Wn. App. 140, 34 P.3d 835 (2001). ER 702 permits testimony by a qualified expert where the "scientific, technical, or other specialized knowledge will assist the trier of fact to understanding the evidence or to determine a fact in issue." *Miller*, 109 Wn. App. at 148, 34 P.3d 835. Furthermore, under ER 703, the testimony of the expert must have a reliable factual basis. *Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282 (1995). Admission of evidence is reviewed under abuse of discretion. *State v. Greene*, 92 Wn. App. 80, 960 P.2d 908 (1998).

Here, Mr. Sherwood did not have the reliable factual basis necessary because he was not provided information regarding Mr. Green's minority interest, the limitation on selling, or the extent or value of Mr. Green's shares. Mr. Sherwood was offered to testify as to the value of the nine (9) pieces of property owned by the GFLP and Senior Trust and

nothing more. Because of the lack of information provided to Mr. Sherwood, the court erred in admitting his testimony and market analysis [EX 12].

Of note, Mr. Moulton, who helped to create the Green's trusts, was the only person who testified handling of minority interest and marketing of minority interest. He testified the appropriateness of discounting minority interests of this kind 40-50%. [RP 204-206]. Prior to trial, counsel for Mrs. Green was provided Mr. Moulton's opinion concerning discounting of 40-50% and elected not to seek proper valuation of the minority interest belonging to Mr. Green. [RP 203].

Mr. Green addressed the issue of his minority interest in his Assignment of Error #3: *Did the court err in failing to set forth appropriate findings in how it determined the value of Mr. Green's minority undivided limited partnership interest?* This was followed with *"having admitted the market analysis, the court valued Mr. Bud Green's share interest in the GFLP at \$481,275.00. The court failed to set forth findings on how it valued Mr. Green's limited partnership shares. This Mr. Green submits is error."* There simply cannot be any misunderstanding, as Mrs. Green alleges, that Mr. Green was challenging the admission of the market analysis and the court's value of the minority shares in the GFLP and how the court determined this value.

Findings of Fact NO. 14 reads "Mr. Green's interest in the Green Limited Partnership was transferred to his family trust and the court values

this asset of \$481,275.” As noted by the courts in *Marriage of Berg* and *Marriage of Gillespie*, the trial court must include in the record its method of valuation and the weight it gave to factors considered. *Berg*, 47 Wn. App 754, 737 P.2d 680; *Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997). Here, however, the Findings of Fact and Oral Decision are void as to how the court determined its value. The Oral Ruling, [CP 177 at line 4-8] simply notes “the husband’s interests that were transferred to his family trust, his Bud and Janice Trust, even if discounted would carry significant value. The court is satisfied at \$481,275.00.” Presumably, the court based its finding on Mr. Sherwood’s market analysis, but it failed to include this in the record. Overall, not only was Mr. Sherwood’s market analysis inaccurate, and thus an error for the court to consider, the court also was in error by adopting this valuation into its ruling without the necessary inclusion of its method.

Counter Issue NO. 6 /Assignment of Error #5: Error in the Valuation and Distribution of the Residence

In his Assignment of Error #5, Mr. Green argues the trial court erred in awarding Mrs. Green the right to reside in the home, rent free, for her lifetime, obligating Mr. Green to pay annual property taxes for life, and not including the value of the residence or life estate in its final calculations for determining a fair and equitable division of property. In her counter-issue, Mrs. Green virtually recited Mr. Green’s Assignment of Error #5 (a) and (b) verbatim. She restated (c) as stated by Mr. Green.

Mrs. Green again raises the issue that Mr. Green failed to denote the Findings of Facts which is deemed error. However, it is clear that Mr. Green provided the relevant Findings of Fact in the body of his argument, in stating the basis of his assignment of error, and in his supporting argument and case law. [Appellant's brief at page 29-33]. When referencing the residence, Mrs. Green also went directly to Findings of Fact NO. 6 and 7. There was no prejudice to Mrs. Green. *Olson*, 126 Wn.2d 315, 893 P.2d 629.

As noted in Mr. Green's brief, the court had been presented testimony and evidence stating the extent of the respective interests in the 2,342 GFLP shares belonging to Bud Green, and the exchange of shares for the ten acres. [EX-R101, 136; RP 368] The court heard testimony that the residence had been constructed with labor by Mr. Green and with community funds of \$175,000. [RP 368, lines 6-25, RP 369 lines 1-18, ROP 403, lines 23-ROP 404 lines 1-16]. Mr. Randy Berg provided the residential appraisal initially at \$355,000 [EX R102] and later adjusted the appraisal to \$330,000 [EX R102].

The court valued the property at \$310,000, but failed to provide the basis for its determination. [Findings of Fact #6] However, a review of the Oral Ruling [CP 173-174, lines 21-25, line 1-3] clarifies the range of consideration. The court correctly found the real property was the separate property of Mr. Green. It also recognized the community's significant contribution regarding improvements. Despite the correct finding, the

method of analysis is unclear in the Court's comments [Oral Ruling, [CP 173, lines 11-15]. There the court notes "here the family home, the entire improvement and the underlying real property, will remain separate property, and it remains the property of the larger family trust which will retain that interest until there is some sort of distribution or transfer by the trust." (Emphasis Ours) This reflects the court's improper consideration of the Senior Trust and GFLP and appears to suggest the Senior Trust will own the real property. See also, Oral Ruling [CP 191, lines 1-22]

Furthermore, the court failed to determine the community interest in the residence. *Conley v. Moe*, 7 Wn.2d 355, 110 P.2d 172 (1941). Instead, the court determined that the property should go into the revocable Junior Trust for the children of Bud and Janice Green. [Findings of Fact #6, CP 195-196]; see also the Court's Oral Ruling [CP 191, lines 19-25] The court abused its discretion by awarding the property to a third party. *McKean*, 110 Wn. App. 191, 38 P.3d 1053; *Arneson*, 38 Wn.2d 99, 227 P.2d 1016.

Furthermore, the court provided Mrs. Green a beneficial interest in the home for life without valuing the same and without including the same in the court's total distribution: "[a] party to a marriage dissolution has the right to have his interest in the property of the parties definitely and finally determined in the decree which dissolves the marriage." *Marriage of Little*, 96 Wn.2d 183, 634 P.2d 498 (1981).

In her response, Mrs. Green fails to properly state Findings of Fact NO. 7, which concerns the distribution of the residence. It states:

“Wife will have a beneficial interest in residing in the home located at 1210 W. Paradise Road, Spokane, WA. as long as she wishes for her lifetime. The home shall not be sold without the wife’s consent during her occupancy. Wife shall not have an ownership interest; it will simply be not unlike a life estate. Wife will not be required to pay rent, but she will need to maintain insurance on the home. Husband will be required to pay the taxes. Bud Green will have ultimately whatever remaining value there may be should Ms. Green decide to vacate that home or should he live longer. Upon Mrs. Green’s death should be a transfer in ownership of the property to the parties’ children.”

But, Mrs. Green injects the term *“in terms of her one-half share of the improvements to the 10 acres”*. [Response Brief, page 22].

Mr. Green referred to Findings of Fact NO. 6 in his brief at pages 29 and 30, and Findings of Fact NO. 7, at page 32, in discussing the issue concerning the residence. In citing Findings of Fact NO. 6, he pointed the court’s reasoning for putting the land and improvements in trust for the children: “[t]hat would honor the management authority that Bud Green now has in decisions for the partnership and the parent’s trust as well as the remainder of the Bud and Janice Green Trust.”

However, the Junior Trust (Bud and Janice Green Trust) was being dissolved/revoked as a result of the dissolution of marriage. All property in the Junior Trust was being asked to distributed between the parties. [CP 191, lines 1-18]

Mrs. Green argues she was allowed to live in the home rent free as a setoff for the wife’s not being awarded the home. She erroneously

argues that she had an ownership interest of \$165,000 in the home and improvements under the language of Findings of Fact NO. 7. She further sets forth other rationale and considerations as to why the court's decision should stand; [Response brief 24-25] but there was no basis for these arguments provided by the court in its Oral Ruling. [CP 173-175].

Mrs. Green also argues that Mr. Green himself represented to the court that he would like that the family home be put in trust for the children. [RP 485, Response Brief page 24]. Although that might have been a factor considered by the court, the court failed to provide any guidance why it did not include the value of the residence or beneficial interest as part of the assets and debts in determining the equalization amount. [CP 205, Decree, paragraph 3.3, CP 197, Findings of Fact NO. 20].

A trial court must include in the record its method of valuation and weight given each of the factors considered in valuing property over which there is a dispute. *Gillespie*, 89 Wn. App. 390, 930 P.2d 1338 (1997). Otherwise appellate review would be impossible. A trial court's failure to include the value of the residence or beneficial life interest as part of the assets and debt in determining the equalization amount creates a clear disparate division of property, resulting in a manifest abuse of discretion. *Urbana*, 147 Wn.App.1, 195 P.3d 959.

Counter Issue NO. 7 & Assignments of Error NO.6, 7 and 8: Error in the Distribution of Bank Balances, Credit Card Debt, and Calculation of Community and Separate Interests

Mr. Green posed the questions separately as to whether the Court abused its discretion in dealing with (a) awarding him the entire bank balances without consideration of funds paid for community or to Mrs. Green [Findings of Fact NO. 9]; (b) directing that he be responsible for credit card debt incurred for the benefit of Esprit Technology [Findings of Fact NO. 16, 17]; (c) in calculating the extent of community and separate property and rendering its decision regarding the transfer payment in reaching a fair and equitable division of property.[Finding of Fact 20]

Mrs. Green consolidated these assignments into her Counter Issue NO. 7, but summarized the assignment of errors insufficiently. Also, despite Mrs. Green's procedural argument, Mr. Green has referenced each assigned error and Findings of Fact as required under RAP 10.3.

(a) Bank Accounts:

Mrs. Green argues that Mr. Green has not demonstrated that only Mrs. Green benefitted by way of pay down of community debts, or that he should be entitled credit. Mr. Green disputes the same.

Mrs. Green benefitted because not only did she and Mr. Green continue to cohabit after filing until June, 2008 [RP 393, lines 18-21], Mr. Green also provided her funds in addition to the maintenance he paid even though he was still in the home, as well as the \$8,500.00 as ordered. Mr. Green specifically testified as to each expenditure, all of which were

known to, authorized, or ratified by Mrs. Green, including the property taxes and insurance she would otherwise have had to pay, as well as income tax preparation, mediation costs, appraisal costs, etc. This amounted to an excess of \$23,000 of community benefits or funds paid to Mrs. Green, which no longer was before the court at trial. Moreover, Mrs. Green was ordered to pay the property taxes and failed to pay the second half taxes, leaving the trial court to order Mr. Green to pay the same while she remained in the home. These funds were disposed of and not also before the court at the time of trial. *White v. White*, 105 Wn. App. 545, 20 P.3d 481 (2001). An adjustment should have been made for these funds not considered in the final distribution.

(b) Esprit Technology Debt:

Mrs. Green next addresses the Esprit Credit Card issue and argues that Mr. Green only sets forth a portion of the Finding of Fact. However, Mr. Green notes he referenced both Findings NO. 16 and 17 and further acknowledged the \$9000 loan to Esprit.

Mr. Green challenges the court's findings that these credit card debts benefitted the community. The evidence noted in Mr. Green's brief, as testified by Mrs. Green, that the credit card was for the sole benefit of Esprit Technology. There was no evidence her job was in jeopardy, nor was there a showing that her job security depended on her incurring credit card debt. Therefore, the Court's findings that these debts, incurred without Mr. Green's knowledge, were to secure her future employment is

untenable and entered for untenable reasons. *Gillespie*, 89 Wn. App. 390, 948 P.2d 1338

(c) Transfer Payment:

Mrs. Green correctly notes that the Assignment of Error # 8 refers to Findings of Fact NO. 20, as indicated by Mr. Green. Mrs. Green submits the record is clear as to how the court determined the equalization payment and cites the court's Oral Ruling [CP 184-90] and Findings of Fact NO. 20. [CP 197].

However, Mr. Green maintains the Court abused its discretion not only in its calculations, but in failing to provide how it valued the minority interest in the GFLP shares, and failing to include all of the property of the parties. Mr. Green also submits a full reading of the Court's Oral Ruling [CP 165-193] clearly indicates the court stepped beyond its jurisdiction in to Mr. Green to draw from the Senior Trust and GFLP to meet any transfer payment or maintenance. *McKean*, 110 Wn. App. 191, 38 P.3d 1053; *Arneson*, 38 Wn.2d 99, 227 P.2d 1016.

Counter Issue NO. 8 / Assignment of Error #9: Error in Considering Mr. Green's Discretionary Authority Over the Senior Trust in Awarding Maintenance

Mrs. Green argues Mr. Green was ordered to pay \$1500 per month temporary maintenance as of August 2008 based on the Husband's ability to pay. [CP 105-108]. She reasons he had the resources to pay simply because Mr. Green made those payments. She further argues Mr. Green has a self-imposed poverty. There is no evidence to support such a

comment. Nor does the fact he paid those obligations as ordered suggest the court's ruling correct or that he had the ability to pay.

Mr. Green testified, from the beginning of this action, he has his social security and Boeing pension as income, \$1824.00 per month. After that, he has had to borrow money or make up the rest of the court's obligations with the use of credit cards. [RP 424 lines 1-25] He has no investments other than Edward Jones. [RP 425, lines 1-15]. He stated he has no income from the partnership. [RP 415, lines 1-3.] The Oral Ruling [CP 170, lines 14-18] sets forth Bud Green's income.

The Court imposed maintenance is based on the Bud Green's discretionary authority under the Senior Trust to invade the Senior Trust. However, the court abuses its jurisdiction to order him to enter the Senior Trust to meet his personal obligations and to meet the court' imposed maintenance and property distribution. There is no tenable basis nor reason nor jurisdiction for the court to do so. *McKean*, 110 Wn. App. 191, 38 P.3d 1053; *Arneson*, 38 Wn.2d 99, 227 P.2d 1016.

In Findings of Fact NO.20, [CP 197] the court directs Mr. Green to pay a transfer (equalization) amount of \$1500.00 per month and in the Court's Oral Ruling, [CP 187, lines 11-13] the court noted Mr. Green had adequate resources to pay those "from non-family resources." Finding of Fact NO. 23 [CP 197] states "the Husband has adequate resources to pay maintenance and property distribution installments without resorting to trust funds." But these comments are opposite to its findings at [CP 170,

lines 14-18]. The court's comments concerning his unique management position in its oral decision clearly indicates its intent that Mr. Green use Senior Trust funds, and not non-family resources. [CP 189-190]; see Findings 5 & 6 [CP 195-196].

Mrs. Green offers no evidence of any other source of income available to Mr. Green, aside from his pension and social security, except the Senior Trust. The fact he has met those obligations instead of being held in contempt should not be held against him.

Finally, in Assignment #9, Mr. Green, pointing to Findings of Fact No. 21 and 23 [CP 197], noted that the court found he could make the \$1500.00 per month equalization payment and \$1500.00 per month maintenance without resorting to his trust. Mr. Green submits there is no evidence to support these findings, and its decision is untenable and not based on tenable grounds. *Marriage of Olivares*, 69 Wn. App. 324, 848 P.2d 1281, review denied 122 Wn. 2d 1009 (1993).

III. REQUEST FOR ATTORNEY'S FEES

Last, Mrs. Green requests her attorney's fees on appeal. She correctly notes that RCW 26.09.140 governs the issue of attorney's fees. On appeal, an appellate court has discretion to award a party costs and fees. Attorney's fees are generally based on need of the requesting party and the ability to pay by the other party.

Mrs. Green further argues that Mr. Green's appeal is frivolous. She sets forth no authority nor argument to demonstrate any frivolity. She

also submits an amended declaration which reflects she can meet her living expenses, except for credit card debt. Mr. Green was also obligated to pay the substantial credit card debt per the Decree. [CP 203-208]

Mr. Green also has requested his attorney's fees and costs. The record reflects that Mrs. Green sought to include the GFLP and Senior Trust into this dissolution action without including them as a party. Her goal was to receive an inheritance which she believed she was entitled [RP 344, lines 9-21]. She attempted to show Mr. Green gifted his shares to community shares by falsifying a document, necessitating Mr. Moulton and Ms. Crockett to testify concerning the same. [RP 384-392] She even testified she was a beneficiary under the Senior Trust, which was inaccurate. She continues to argue entitlement to funds from the Senior Trust. Ms. Green acted intransigently. *Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989). The trial court did not award any attorney's fees. This Court should deny her request for fees and award Mr. Green his fees for her intransigence.

Dated this 20 day of January, 2011.

Respectfully Submitted

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