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COURT OF APPEALS
DIVISION III
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NO. 28858-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

JANICE GAI GREEN,
Petitioner/Respondent,

vs.

HAROLD JOSEPH GREEN,
Respondent/Appellant.

BRIEF JANICE GAI GREEN IN RESPONSE

Bevan J. Maxey, WSBA #13828
Attorney for Respondent

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A. COUNTER-STATEMENT OF ISSUES PRESENTED

Procedural infirmities.

1. Whether, as a result of the failure of appellant, HAROLD JOSEPH GREEN, to assign specific error, in the manner required under Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP], to either (a) the oral findings of the superior court of Spokane County, State of Washington, entered on November 13, 2009, or (b) the written findings of fact set forth in the "Findings of Fact and Conclusions of Law" [CP 194-202] and "Decree of Dissolution," [CP 203-08], entered on February 1, 2010, those factual determinations of the superior court must now be considered verities on appeal and the established facts of this case [see, Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959); see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000)]?

2. Whether, as a result of the findings of the superior court now being considered verities for purposes of this review, the only remaining issue on this appeal is whether said findings of fact support the conclusions of law, and judgment and decree of the superior court [CP 165-93, 194-202, 203-08]?

Substantive Issues. In the event the foregoing procedural infirmities are not wholly dispositive of this appeal, it should be observed from a simple review of the revised copy of "Appellant's Brief" that Mr. GREEN has once more failed to comply with RAP 10.3(a)(4), and also

form 6 appended to the Rules of Appellate Procedure, which specifically mandate that the appellant's brief must contain, not only a section devoted to appellant's "Assignments of Error," but also a separate and distinct section identifying those "Issues Pertaining to Assignments of Error." In terms of the latter, Mr. GREEN has no such section in the body of his brief. A mere reiteration of Mr. GREEN's assignments of error, as set out in question form in the index section of his brief is totally at odds with the requirements of RAP 10.3(a)(4) and form 6. Consequently, the respondent, JANICE GAI GREEN, now submits the following counter-statement of substantive issues present in this appeal, taking into account appellant's stated assignments of error.

3. Whether the Superior Court of Spokane County, State of Washington, was legal obligated, as claimed by the respondent, to first obtain jurisdiction over the Green Family Limited Partnership, as well as the Green Living Trust created by Mr. GREEN'S parents in 1995, before determining a value to be assigned to the husband's separate property interest in the assets that composed that limited partnership [CP 177]?

4. Whether the Superior Court of Spokane County, State of Washington, abused its discretion in allowing appellant's real estate appraiser, Dewitt Sherwood, to testify as to the value of the nine [9] parcels of land encompassing the assets of the Green Family Limited Partnership [CP 44-47, 59-60, 68; Exh. 12]?

5. Whether, contrary to the appellant's claim, the Superior Court of Spokane County, State of Washington, did not in fact take into account his tentative interest in his mother's living trust of 1995 in terms of him being a named beneficiary and as trustee?

6. Whether the Superior Court of Spokane County, State of Washington, abused its discretion (a) in failing to properly characterize and value the residence and provide the basis for its determination, (b) in failing to include and divide the residence as part of the property division rather than retaining the same in trust for the benefit of the parties' children, and (c) in allowing wife to have the beneficiary use--but no ownership interest, of the home for so long as she chooses live there, while at the same time requiring him to pay property taxes? [CP 173, 174-75, 195-96]?

7. Whether the Superior Court of Spokane County, State of Washington, abused its discretion in terms of its decision concerning the distribution of other property and debt as between the parties, and in awarding the wife an equalization or transfer payment of \$278,766 as against the husband [CP 179-92, 197, 204-06]?

8. Whether the Superior Court of Spokane County, State of Washington, abused its discretion in awarding the wife spousal maintenance in the amount of \$1,500 a month for the period one [1] year as against the husband [CP 181, 190, 197]?

B. COUNTER-STATEMENT OF THE CASE

This appeal concerns various aspects of the superior court's valuation, characterization and distribution of property and debt, as well as the award of one-year spousal maintenance in the underlying marriage dissolution action. As evidenced below, this was a long term marriage of 46 years. [RP 344]. The operative facts can be summarized as follows:

1. Factual Background. The parties were married in Coeur d'Alene, Idaho, on May 5, 1962, prior to the wife graduating from high school in Spangle, Washington, and at the time of separation had been married 46 years. [RP 32, 363, 483; CP 4, 158, 167, 170]. They had originally met in junior high school and began dating when they were in their early teens in high school. [RP 450; CP 158]. Upon the wife's subsequent graduation from college at Eastern Washington University, the couple moved to Seattle in 1967. [RP 36; CP 158-59]. There, the wife found employment as a teacher in home economics, and later ran a home day-care facility and also worked for Amway and Jenny Craig. [RP 34-35, 452; CP 159].

During this same period of time in Seattle the couple had two sons, Brad and Aaron Green, for whom the wife was their primary caregiver. [RP 451; CP 159]. Each son is now of the age of majority and emancipated. [CP 3-4, 159].

Also, while the family resided in Seattle, the husband attended college at the University of Washington with a focus on engineering. [RP

34-35, 450]. Later on, he worked as a mechanic for various businesses and was ultimately hired as a supervisor in the future development division of Boeing Company. [CP 159, 195].

In 1991, the parents of the respondent, HAROLD JOSEPH GREEN, won \$4,000,000 in the state lottery. [RP 12, 37, 143; CP 168]. They eventually established the Green Family Living Trust in 1995 where monies from the lottery proceeds were placed, and also established the Green Family Limited Partnership on December 12, 1994, which included assets of nine parcels of farmland located in Spokane County. [RP 81-82, 83, 165, 183, 206, 349, 366-67; CP 159-60, 195, 197; Exh. 136, 140, 141].

After establishing their living trust, the parents started gifting \$10,000 a year each to Mr. GREEN as well as his wife, JANICE GAI GREEN, \$5,000 a year to each of their sons, and \$10,000 each to both Mr. GREEN's brother, Stephen Max Green, and his wife. [RP 12, 37, 84, 97, 143-44, 187-88, 212, 258, 434, 436, 457, 490; CP 159]. The \$10,000 gifts were eventually increased to \$12,000 per annum in 2006. [RP 461-62; CP 160].

In 1994, at age 50, Mr. GREEN decided to retire from Boeing. [RP 324, 443; CP 3, 159]. His father was in ill health, and the couple decided to move to Spokane in the summer of 1994 so that they could be closer to Mr. GREEN's parents. [RP 38-39, 149-50, 443-44, 460-61; CP 159]. For a time, they lived off of the gifts of money from his parents. [RP 40-41, 97; CP 159].

Both parties had a very good relationship with Mr. GREEN's parents. [RP 37-38, 157, 460, 492]. Ms. GREEN in fact assisted in providing care for them. [RP 461].

After moving to Spokane County, 10 acres of land from the Green Family Limited Partnership were quit-claimed by Mr. GREEN's parents, so that the GREENS could built a house on this property, situated 1210 West Paradise Road. [RP 13, 153, 333-34, 358, 368; CP 195-96; Exh. 101]. The couple had sold their home in Seattle before moving and used the proceeds from that sale, along with the gifts from Mr. GREEN's parents, to build their new home. [RP 166-67, 217, 368-69; 459-60; CP 195]. The parents deducted 2,342 shares from Mr. GREEN's interest in the limited partnership in exchange for the 10 acres of property. [RP 85, 199, 414]. His brother Stephen received 25,000 limited shares in the partnership. [RP 199-200].

Approximately, one year after returning to the Spokane area, the couple decided they could no longer live off of the gifts from Mr. GREEN's parents. Since Mr. GREEN chose not to return to work [RP 42], he requested that his wife find work in order to meet the family's financial needs. [RP 40-41].

Thereafter, Ms. GREEN returned to work taking on several jobs in the educational field and eventually was employed with Esprit Technologies in Spokane from 2002 until April 2008. [RP 41, 154-57; CP 159, 195]. That employment terminated when the business began to falter

financially. [RP 108; CP 195].

Mr. GREEN never returned to work after leaving Boeing Company. [RP 42, 324-25]. His only income since 1995 has been monies received from his parents. [RP 346].

For a time, the couple infused certain sums in Esprit so that the business might remain afloat. [RP 101-05; 106-07, 127-29, 263-77, 287, 288, 335-38, 408, 417-21; 488; CP 197]. Both the GREENs were interested in maintaining wife's employment with this company, and there was the added benefit of potentially receiving an interest in the business sometime in the future. [RP 101-05, 106-07, 127-29, 263-77, 287, 289, 359-60; CP 197].

After his father's death in 2005, and because his mother declining mental state after having suffered a stroke in 1995, Mr. GREEN became trustee of his Green Family Living Trust sometime in 2007 or 2008 and began managing his mother's assets in that trust. [RP 223, 321, 462-63, 465, 467-68; CP 195]. As before, the annual tax exempt gifts to himself, his brother and both their wives, and also the parties' children, continued uninterrupted. [RP 37, 434, 436, 457].

On June 25, 1998, the parties created their own living trust or junior Green trust. [RP 85, 190-91, 193-94, 221, 237, 254, 361, 483; CP 195; Exh. 10, 105]. It was contemplated by the parties that this revocable trust could be dissolved in the event of divorce. [RP 168]. Along with certain community assets, Mr. GREEN assigned the 10 acres which his

parents had earlier quit-claimed out of their limited partnership for the purpose of building the family house thereon, along with 23,158 limited shares of stock he had received from the Green Family Limited Partnership. [RP 14-15, 58, 85, 127, 159, 160-61, 164, 165, 187, 191, 192, 199, 349-50, 351, 414, 430-31, 433, 481-82; CP 195; Exh. 105]. As an aside, Mr. GREEN had also received 400 general shares from the limited partnership created by his parents, but these were not placed in the parties' living trust or junior trust. [RP 433].

2. Procedural History. On April 15, 2008, Ms. GREEN discovered that her husband was having sexual relations with his mother's in-home care provider. [RP 95; CP 8]. The parties separated on that same date, and as a result of the affair, Ms. GREEN filed a petition for dissolution of marriage on April 18 in the superior court of Spokane County, State of Washington, under cause no. 08-3-00882-5. [RP 95-96, 258; CP 3-6]. At this same time in filing her petition, Ms. GREEN requested the court to enter an order requiring Mr. GREEN to pay her spousal maintenance during the pendency of the divorce and also to prohibit Mr. GREEN from misusing community funds [CP 9], and which relief the court granted in terms of \$1,500 a month maintenance, and a \$2,500 award of attorney fees, on August 29, 2008. [CP 105-08, 109].

Ms. GREEN remained unemployed at the time of trial. [CP 169]. She began receiving social security benefits of \$986 per month in November 2008. [RP 312, 314]. This was in addition to spousal

maintenance she was receiving from Mr. GREEN during the pendency of the divorce proceedings. [RP 474, 477].

After the parties' separation, Mr. GREEN, chose to exercise his discretion as trustee of the senior Green Family Living Trust, and stopped the annual gifting of funds to Ms. GREEN and himself, although the tax exempt gifts continued to be paid to both his brother, Stephen, and his wife, along with the parties' two adult sons. [RP 259-60, 321, 335, 429, 434-35, 436, 463-64, 474, 476; CP 195]. Rather than take out funds from his parents' living trust in terms of gifts to himself, Mr. GREEN continued to withdraw funds, but chose to denominate the same as loans to himself. [RP 438-39, 433, 473; CP 195]. He has unlimited authority as trustee to make loans to whomever he chooses. [RP 472-73].

In addition to the continued tax exempt gifts to his brother from his mother's trust, Mr. GREEN has made loans of \$3,500 a month to Stephen as a draw-down against his eventual share of his mother's trust after her death. [RP 436-38, 464, 470-71, 472-73, 475]. At the time of trial, these loans to Stephen totaled \$42,000. [RP 475].

Finally, although he was fully entitled to receive compensation for his services as trustee of said trust, Mr. GREEN chose not to take any fees for managing his mother's trust and assets. [RP 250-51, 252, 430].

Trial was held in this matter in October 2009. [RP 1, et seq.; CP 194, 276]. Prior to this time, the parties had resolved some issues pertaining to property distribution through mediation. [RP 115-16; CP

171]. After trial, the court took the matter under advisement, and entered its oral decision on November 13, 2009. [CP 165-92, 276]. During its ruling on the case, the superior court determined that Mr. GREEN's shares of stock in the Green Family Limited Partnership, which had been transferred to the parties' 1998 living trust remained the husband's separate property, along with the 10 acres of land upon which the family home was built. [CP 172-73, 179-80]. Mr. GREEN was allowed to keep the parties' living trust with his interest therein being valued at \$584,694, while the wife in turn was given a \$27,162 credit in terms of her interest in community assets associated with the trust. [CP 172, 182].

During the course of its oral opinion, the superior court noted that notwithstanding the separate nature of certain property, this was a marriage of long duration and all property of the parties, including separate property, is before the court when reaching a decision on issue of a fair distribution of assets and debt. [CP 167, 170, 177, 181]. This sentiment was also expressed in the court's findings of fact. [CP 194, 197].

With respect to the value of the nine parcels of land underlying Mr. GREEN's shares and interest in the Green Family Limited Partnership, the court valued the same at \$481,275 based upon the appraisal of DeWitt Sherwood, a licensed general real estate appraiser in Washington and Idaho. [RP 49-50, 53-54, 55-56, 61, 480; CP 177, 182-83; Exh. 12]. In addition to this separate property, Mr. GREEN was allowed to keep his Boeing retirement even though this constituted a community asset. [CP

183].

As to the value of community improvements to the 10 acres of land, the court valued the property at \$310,000 which was a figure between the Randy Berg/DeWitt Sherwood appraisals of \$355,000 and \$330,000, respectively, and the \$250,000 figure which had been reached during the mediation process. [RP 300-02, 369, 484-85; CP 173; Exh. 102]. In terms of both this land, as well as the community improvements thereon, the court decided they would be placed in the 1998 trust for the ultimate benefit of the parties' two children. [CP 174-75].

There was testimony at trial suggesting that the purpose of the parents' trust and limited partnership was to maintain all the property within the family. [RP 256]. In fact, Mr. GREEN represented to the court during his testimony on cross-examination that he would like the family home put in trust for his children and, ultimately, that they should received or inherit this property. [RP 485]. In his view, if Ms. GREEN continued to live in the house and something happened to her, then the parties' two sons should have the option of living there. [RP 485].

As to the immediate use of the family home, the court did decide that Ms. GREEN would have the beneficial use--but not ownership interest, of the property during her lifetime or until such time as she chose to vacate the premises. [CP 174-75]. Again, the remainder interest in the property would be held in the 1998 living trust of the parties for the benefit of their two sons. [CP 174-75]. Mr. GREEN would be responsible for

paying property taxes on the property and Ms. GREEN would, in turn, be obligated to pay insurance and other maintenance expenses. [CP 174-75].

As to the parties' debts, the court decided that the community liability and debts, including those associated with Esprit Technologies, would be divided equally between the parties. [CP 182]. Finally, the court held that the wife was entitled to an equalization or transfer payment of \$278,766 as against the husband. [CP 186-90]. In its subsequent findings of fact, entered on February 1, 2010, the court opined that, given "[t]he community assets, the liabilities and the net worth of the parties puts them in dramatic contrast [in terms of the amount of the husband's separate assets] and an equalization payment in [that amount] is appropriate as part of the equitable distribution." [CP 197].

Ms. GREEN was also awarded one [1] year spousal maintenance at the rate of \$1,500 per month. [CP 181]. After that, the \$1,500 a month equalization payments would continue. [CP 181]. Following the court's oral decision, "findings of fact and conclusions of law" and "decree of dissolution" were entered to the same effect on February 1, 2010. [CP 194-202, 203-08]. This appeal of the respondent husband followed. [CP 209-225]. Additional facts and circumstances are set forth below as they pertain to a particular issue or issues on this appeal.

C. STANDARD OF REVIEW

The issues on appeal are generally governed by the following

standards of review insofar as those particular issues entail a combination of (1) issues of fact, (2) mixed issues of law and fact, and (3) issues concerning the abuse of discretion by the trial court. Errors of fact which have been properly preserved for review, by way of assignment of error and corresponding argument, are reviewed on the basis of substantial evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 103 (1959). In terms of the underlying record, substantial evidence exists when there is evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premise set forth in a finding of fact. State v. Halstein, 122 Wn.2d 109, 128, 857 P.2d 270 (1993); Olmstead v. Department of Health, 61 Wn.App. 888, 893, 812 P.2d 527 (1986); Green Thumb, Inc. v. Tiegs, 45 Wn.App. 672, 676, 726 P.2d 1024 (1980).

In contract, mixed questions of law and fact are considered both in terms of a quantitative determination of substantial evidence as to the latter and, as to the legal aspects of such issue, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). In either case, if a factual finding is supported by substantial evidence, the only issue remaining is whether such factual determination supports the corresponding conclusions of law and judgment of the court. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984); see also, In re Marriage of Verbin, 92 Wn.2d 171, 184-85, 595 P.2d 905 (1979); see also, State v.

Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). If they do, affirmance of the superior court is in order. Id.

Aside from the foregoing standards, the appellant is required to assign specific error to each challenged finding of fact in the manner prescribed in Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP]. Otherwise, the factual determinations of the trial court will be considered verities on appeal and the established facts of the case. See, State ex rel. Bain v. Clallum County Bd. of Cy. Comm'rs., 77 Wn.2d 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). Failure to follow those requirements when challenging findings of fact is not a mere "technical flaw" which can be simply overlooked. State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000).

When such factual determinations are deemed verities on appeal, once again the only remaining issue for the appellate court to decide is whether said findings support the conclusions of law, and judgment and decree of the superior court. Eggert, at 854; Silverdale Hotel Assocs. at 766; see also, In re Marriage of Verbin, at 184-85.

Finally, with respect to issues involving the exercise of discretion by the trial court, the standard of review is abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). A challenge to the decision of the superior court involving property and debt distribution

is reviewed on appeal for manifest abuse of discretion. In re Marriage of Kraft, 119 Wn.2d 438, 832 P.2d 871 (1992).

The court has wide discretion in this regard. In re Marriage of Olivaries, 69 Wn.App. 324, 330, 848 P.2d 1281 (1993). The superior court may only be said to have so abused its discretion if the court acted on untenable grounds or for untenable reasons. State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Gillespie, 89 Wn.App. 390, 948 P.2d 1338 (1997). In other words, the issue of manifest abuse rests upon a determination "whether no reasonable judge would have reached the same conclusion" under the facts and circumstances presented. See, Bourgeois, at 406. Only then will the superior court be reversed on appeal. Id.

D. ARGUMENT IN RESPONSE

1. Counter-issues nos. 1 through 3. At pages 20 through 21, of the "Appellant's Brief," Mr. GREEN seemingly argues that the superior court was first required to obtain jurisdiction over the Green Family Limited Partnership and the Green Living Trust established by his parents in 1995 before attempting to value his undivided interest in the nine parcels of real estate which constitute the partnership assets. However, not only has the appellant failed to identify, or otherwise set out verbatim, any factual error associated with the valuing of the subject property as is prescribed under Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP], see, State ex rel. Bain v. Clallum County Bd.

of Cy. Comm'rs., 77 Wn.2d 542, 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000); but his argument and claims are totally nonsensical and present a non-issue in terms of the parameters of the trial court's decision. Simply put, there is no order, decree or judgment entered by the court which in any way affects either of these two entities, or Mr. GREEN in his capacity as trustee of his parent's 1995 trust, nor does the final decree of the court in any way change Mr. GREEN's separate ownership interest in the limited partnership. [CP 203-08].

By the same measure, it would be inappropriate for the court to not take into account the value of this substantial separate asset, as represented by the underlying nine parcels of land, when framing a fair and equitable distribution of assets and debt as required under RCW 26.09.080. As Mr. GREEN himself readily acknowledges on pages 16 and 18 of his brief: "In a dissolution action, all property, both community and separate, is before the court for distribution" [Emphasis added] [Citations omitted], and "the trial court must make a 'just and equitable' distribution of the property and liabilities of the parties after considering all relevant factors, including the nature and the extent of the separate and community assets and the duration of the marriage." [Emphasis added] [Citations omitted].

Finally, it should be noted that none of the caselaw cited by the appellant stands for the proposition that, under the facts and circumstances

of this case, the court was in any sense required to first obtain jurisdiction over the limited partnership or the 1995 living trust, or over Mr. GREEN in his capacity as trustee of that trust, before valuing his interest in the limited partnership and the underlying parcels and acreage. Once again, these entities were in no way being affected by this action.

Given Mr. GREEN's failure to provide adequate legal citation in support of his unsubstantiated claims in this regard, Mr. GREEN's arguments on this non-issue should not be entertained and should be simply dismissed out of hand. See generally, RAP 10.3(a)(6). In sum, the arguments of Mr. GREEN's argument on this point are without merit and, accordingly, the decision of the superior court should be affirmed on this appeal. See, RAP 12.2.

2. Counter-issues nos. 1, 2 and 4. On pages 21 through 25 of the "Appellant's Brief," Mr. GREEN claims that DeWitt Sherwood was unqualified as an expert in terms of his appraisal of the nine parcels of land associated with the Green Family Limited Partnership, and the court should not have accepted his testimony as to the value of the same. Suffice it to say, under Rule 702 of the Washington Evidence Rules [CR], the court has broad discretion when determining the qualifications of a witness to testify as an expert. Miller v. Likins, 109 Wn.App. 140, 34 P.3d 835 (2001). Here, there was more than substantial evidence upon which the court could decide that Mr. Sherwood was qualified to testify as to the appraised value of the nine parcels composing the assets of the limit

partnership and, of which, Mr. GREEN had an indivisible interest [RP 46-54; Exh. 12]. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 103 (1959). The mere fact the appellant sought to challenge Mr. Sherwood's valuation of the land by way of the testimony of Attorney Rial Moulton [RP 201-06] in the unrelated context of a sale of shares of the partnership is of no consequence. Id.

First, a sale of shares was never contemplated in this case, nor is there any concern for any tax ramification associated with the purpose of this particular valuation. [RP 201-06]. Second, Attorney Moulton is no expert per se in terms of appraisal of real estate; his expertise is instead limited estate planning. [RP 182-206]. Finally, Mr. GREEN chose not to present the testimony of any other qualified appraiser, so as to rebut Mr. Sherwood's testimony and to provide a different valuation of Mr. GREEN's interest in the subject nine parcels.

This alone constitutes invited error on appellant's part. See, In re Marriage of Blakely, 111 Wn.App. 351, 360, 44 P.3d 924 (2002). A party may neither set up, or otherwise idly ignore, an error at trial and then be heard to complain about the same on appellate review. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002); Lavigne v. Chase, Haskell, Hays & Kalamon, P.S., 112 Wn.App. 677, 681, 50 P.3d 306 (2002).

In short, the superior court cannot have abused its discretion in accepting Mr. Sherwood's testimony and appraisal of the subject property,

when Mr. GREEN chose to sit idle and offered no appraisal of his own. Id. For these reasons, this aspect of the decision of the superior court should be affirmed. RAP 12.2.

3. Counter-issues nos. 1, 2 and 5. On pages 25 through 27 of the "Appellant's Brief," Mr. GREEN goes on to argue that the superior court improperly considered and took into account his tentative interest in his mother's living trust of 1995 in terms of him being a named beneficiary, as well as him being trustee of said trust, when entering its decision on the distribution of assets and debts. This argument is totally devoid of any merit.

First, Mr. GREEN has once again failed to set out verbatim any assignment of error in connection with the trial court's factual determinations which might be associated with this issue as required under Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP], see, State ex rel. Bain v. Clallum County Bd. of Cy. Comm'rs., 77 Wn.2d 542, 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000). Respondent submits that this failure to properly assign error is due in part because there are no findings of fact to support his position, as was the case with respect to counter-issue no. 3.

Second, Mr. GREEN has failed to comply with the requirement that all statements of fact must be supported by the appropriate citations to

the record. See, RAP 10.3(a)(5). Aside from his bald allegations of fact concerning the decision of the court, Mr. GREEN has provided no evidence in the record suggesting that the court did in fact take into account the factors of him being a beneficiary of his mother's living trust, or his capacity as trustee thereof, when framing its distribution of property and liabilities under RCW 4.29.080. In other words, there is no showing that either of these factors were given a value, or even considered an asset, by the court.

In fact, the full quotation of paragraph 2 of the court's finding of fact no. 5, and which is taken out of context by Mr. GREEN on page 25 of his brief, reads as follows:

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 the gift. The court recognizes this separate interest. There is nothing that is going to prevent him from making management decisions as a fiduciary for his mother in the way he needs to, and that is consistent with the estate planning that has been in place through the years.

[Emphasis added]. [CP 195]. In other words, the court took a hand-off position concerning Mr. GREEN's beneficiary interest and trustee relationship to the Green Family Living Trust of 1995. [CP 195]. Such interests of the appellant in this 1995 trust are not even mentioned or

referenced in paragraph 3.2 of the "Decree" as to property awarded the husband. [CP 204].

In sum, the arguments raised by Mr. GREEN concerning counter-issue no. 5 are without merit and, hence, the decision of the superior court should be affirmed on this appeal. See, RAP 12.2. 4. Counter-issues nos. 1, 2 and 6. On pages 28 through 33, and pages 41, 42 through 47, of "Appellant's Brief," Mr. GREEN argues the superior court abused its discretion (a) in failing to properly characterize and value the residence and provide the basis for its determination, (b) in failing to include and divide the residence as part of the property division rather than retaining the same in trust for the benefit of the parties' children, and (c) in allowing wife to have the beneficiary use--but no ownership interest, of the home for so long as she chooses live there, while at the same time requiring him to pay property taxes. Once again, Mr. GREEN has failed to set out verbatim any assignment of error in connection with the trial court's factual determinations which might be associated with this issue as required under Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP], see, State ex rel. Bain v. Clallum County Bd. of Cy. Comm'rs., 77 Wn.2d 542, 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000). His mere reference on pages 29, 30 and 43 to findings 6 and 7 does not suffice. Id.

In finding of fact no. 6, the superior court stated that "there is difficulty in separating adequately the financial values of the improvement on real estate that is owned by one party versus the underlying real property owned by another party." [CP 195]. In that same finding, the court noted that "[t]here is a significant community interest in the home" itself. [CP 195]. Consequently, the court determined "[t]he value of the home and real property located at 1210 W. Paradise Road, Spokane, Washington will be at \$310,000." [CP 196]. The court reached this value as being a reasonable compromise between the Randy Berg/DeWitt Sherwood appraisals of \$355,000 and \$330,000, respectively, and the \$250,000 figure which arose during the mediation process. [RP 300-02, 369, 484-85; CP 173; Exh. 102].

In finding of fact no. 7, the court then went on to state that, in terms of her one-half share of the improvements to the 10 acres constituting Mr. GREEN's separate property, the [w]ife will have a beneficial interest in residing in the home . . . , as long as she wishes for her lifetime." [CP 196]. However, the wife would "not have an ownership interest" in this improvement. [Emphasis added]. [CP 196].

The court then went on the state:

The 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 Ms. Green's death, there should be transfer in ownership of the property to the parties' children.

[Emphasis added]. [CP 196]. Again, no assignment of error has been properly made in terms of these findings. They are no verities on this appeal. See, RAP 10.3(a)(4), 10.3(g) and 10.4(c).

Even so, as to Mr. GREEN's claim that the court abused its discretion distributing this improvement in the manner it did, this claim is entirely unfounded when operative facts are taken into account. First, while wife was allegedly allowed to continue living in the home "rent-free," she received no ownership interest. Instead, Mr. GREEN and the children were awarded the full title and ownership interest in this community improvement once the wife either passed away or voluntarily chose to vacate the home. [CP 196]. In this vein, Mr. GREEN was allowed to keep the 1998 trust. [CP 172, 182].

In turn, the lack of rent was a setoff for the wife not having been awarded any ownership interest in the \$310,000 improvement. In other words, by having to forego her ownership claim of \$165,000 interest in the home or improvement under the language of finding no. 7, any rent the wife might otherwise have been obligated to pay for the beneficiary use of the home was adequately covered by the court's ruling. On page 41 of his

brief, Mr. GREEN fails to recognize this in claiming the court should have assigned a rental value to his wife's use of the subject home.

Second, as to the payment of taxes by the husband and insurance by the wife, this is clearly another setoff towards the wife's community interest in the family home. After all, it is the husband who was awarded, as his separate property, the 10 acres upon which the home was situated, as well as the ultimate ownership interest in this community improvement. Thus, it is only fair and just that he pay the property taxes.

In turn, the husband was given no responsibility for maintaining insurance or other costs associated with the maintenance of the home. [CP 196]. Under finding no. 7, this responsibility is left to the wife. [CP 196]. Third, in terms of the distribution of this property, there was testimony at trial that the primary purpose of the parents' trust and limited partnership was to maintain all the property within the family. [RP 256]. Thus, the court's handling of the property was consistent with this purpose of the Green family.

Finally, and perhaps most importantly, Mr. GREEN himself represented to the court that he would like the family home put in trust for his children and, ultimately, that they should receive or inherit this property. [RP 485]. Stated differently, if Ms. GREEN were allowed to continue living in the house and something later happened to her, then it was Mr. GREEN's desire that the parties' children should have the option of living there, if they so chose. [RP 485].

Given these additional considerations, along with the fact that findings nos. 6 and 7 [CP 195-96] are now verities on this appeal, it cannot be said that the superior court's handling or distribution of this property is based upon untenable ground, or for untenable reasons, so as to constitute a manifest abuse of discretion. See, State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Gillespie, 89 Wn.App. 390, 948 P.2d 1338 (1997). In sum, the arguments raised by the appellant concerning counter-issue no. 6 are equally without merit and, accordingly, the decision of the superior court should be affirmed on this appeal. See, RAP 12.2.

Counter-issues no. 1, 2 and 7. On pages 33 through 42 of the "Appellant's Brief," Mr. GREEN argues that the superior court further abused its discretion in terms of its distribution of other property and debt as between the parties, and in awarding the wife an equalization or transfer payment of \$278,766 as him.

a. Wells Fargo Bank Account Balance. As to this isolated aspect of the property distribution, Mr. Green argues, on pages 33 through 36 of his brief, that the court improperly awarded him certain bank account balances, while not taking into account that certain funds in these accounts were allegedly used to benefit Ms. GREEN and the community. Ostensibly, this issue relates to the court's finding of fact no. 9 [CP 196], and the distribution of the Wells Fargo bank account set forth in the decree. [CP 204-05].

However, once again, Mr. GREEN has failed to set out verbatim any assignment of error concerning finding of fact no. 9, or any other particular finding, as required under Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP], and finding no. 9 must now, therefore, be considered a verity on appeal. See, State ex rel. Bain v. Clallum County Bd. of Cy. Comm'rs., 77 Wn.2d 542, 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000). In addition to this infirmity, there is nothing in the record to suggest that Mr. GREEN raised this issue in the trial court--by way of any motion for reconsideration contemplated under Rule 59 of the Washington Civil Rules for Superior Court [CR], or otherwise. Under such circumstance, the issue should not be considered on appeal. RAP 2.5(a).

Even if the issue could properly be raised, a review of pages 33 through 36 of Mr. GREEN's brief does not demonstrate how it was Ms. GREEN alone who benefited by any pay-down of community debts. At the same time of filing of her petition for dissolution, Ms. GREEN requested the court to enter an order requiring Mr. GREEN to pay her spousal maintenance during the pendency of the divorce and also to prohibit Mr. GREEN from using community funds for his own benefit. [CP 9]. The court granted this relief in terms of \$1,500 a month maintenance, along with a \$2,500 award in attorney fees on August 29,

2008. [CP 105-08, 109]. Hence, he was obligated to pay these expenses without having any justifiable right or expectation of receiving a credit for the same in terms of the court's decision on distribution.

Furthermore, aside from temporary maintenance and the \$2,500 attorney fees, Mr. GREEN has not demonstrated how his wife alone benefited from any of the other claimed expenditures. For example, he admitted at trial that he changed the bank account numbers so his wife could no longer access them. [RP 485]. In addition, he acknowledged using community funds to pay for expenses associated with assets belonging to his parents' trust, and also his own attorney fees. [RP 486-88].

Simply put, Mr. GREEN has not established that he is entitled to any credit, nor has he identified an amount certain for which he should have been given credit for the same. After all, it should be noted that, in terms of any alleged disparity, Mr. GREEN received the lion's share of the Wells Fargo account balance. [CP 204-05].

Thus, even if Mr. GREEN had raised this issue at the trial level, it cannot be said that the court's decision, in terms of this isolated aspect of the property division, was entered upon untenable grounds or for untenable reasons. See, State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Gillespie, 89 Wn.App. 390, 948 P.2d 1338 (1997).

b. Esprit Credit Card Debt. As to the debt associated with Esprit Technology, Mr. GREEN argues on pages 36 through 41 of his brief, that the superior court improperly characterized the Esprit credit card debt incurred by the wife as a community obligation. This issue relates to the court's finding of fact no. 16. [CP 197].

However, even if the appellant's reference to this finding, on pages 36 and 37 of his brief, can be said to constitute a proper assignment of error under Rules 10.3(a)(4), 10.3(g) and 10.4(c) of the Washington Rules of Appellate Procedure [RAP], he only sets forth verbatim the first sentence of that finding and not the remainder of that finding. Thus, at a minimum, the remainder of Finding of Fact no. 16 should now be considered a verity on this appeal. See, State ex rel. Bain v. Clallum County Bd. of Cy. Comm'rs., 77 Wn.2d 542, 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000).

Once again, in addition to this infirmity, the record on appeal does not reflect that Mr. GREEN ever raised this issue in the trial court. Under such circumstance, the issue should not now be considered on this appeal. RAP 2.5(a).

Nevertheless, even if the issue had been raised, there is substantial evidence to support any challenge to finding of fact no. 16. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 103 (1959).

The complete text of finding of fact no. 16 states, as follows:

While the marriage was still intact, the parties tried to somehow infuse resources into the Esprit business efforts to keep it afloat. The community benefitted in trying to save that so Ms. Green could continue to have an ongoing income stream and a profession to follow. Dividing the \$9,000.00 obligation owed to the parties, in half, by Esprit Technologies is appropriate.

Significant debt was accruing based on Ms. Green's continuing efforts to maintain viability in her future employment. Because that was also dedicated toward community benefit and betterment, even though Mr. Green didn't know about a lot of those efforts and those bills, he should share in the credit card debt. Any other monies received from the obligation owed by Esprit Technologies should also be applied towards the Esprit Technology credit card debt obligation.

[CP 197]. In the record, there is clearly evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premises set forth in that finding of fact, and Mr. GREEN cannot show otherwise.

State v. Halstein, 122 Wn.2d 109, 128, 857 P.2d 270 (1993); Olmstead v. Department of Health, 61 Wn.App. 888, 893, 812 P.2d 527 (1986); Green Thumb, Inc. v. Tiegs, 45 Wn.App. 672, 676, 726 P.2d 1024 (1980).

As stated before, one year after returning to the Spokane area, it became apparent that the parties simply could no longer live off the gifts from Mr. GREEN's parents. Since Mr. GREEN chose not to return to work [RP 42], the wife had no choice but to find employment in order to

meet the family's financial needs. [RP 40-41]. Ms. GREEN was eventually employed with Esprit Technologies. [RP 41, 154-57; CP 159, 195]. That employment terminated in April 2008, when the business faltered financially. [RP 108; CP 195].

Prior to this time, the parties infused certain sums in Esprit so that the business might remain afloat. [RP 101-05; 106-07, 127-29, 263-77, 287, 288, 335-38, 408, 417-21; 488; CP 197]. Both the GREENs were interested in maintaining her employment with this company, and there was the added possibility of the parties' receiving a future interest in the business. [RP 101-05, 106-07, 127-29, 263-77, 287, 289, 359-60; CP 197].

Since finding of fact no. 16 must either be considered a verity on this appeal, or it is otherwise supported by substantial evidence, Mr. GREEN has no basis to claim that this aspect of the court's division of debt was based upon untenable grounds or entered for untenable reasons. See, State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Gillespie, 89 Wn.App. 390, 948 P.2d 1338 (1997). As a general proposition, property and debt acquired during marriage is presumed to be community and, in this case, Mr. GREEN has not shown otherwise. See generally, In re Estate of Madsen v. Commissioner of Internal Revenue, 97 Wn.2d 792, 650 P.2d 196 (1982). This presumption can only be overcome by clear and convincing evidence. Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 26 Wn.App. 351, 353, 61 P.2d 169 (1980).

Even so, as Mr. GREEN acknowledges on page 18 of his brief, a mis-characterization of property or debt is not grounds for reversal if the overall distribution is fair and equitable. In re Marriage of Shannon, 55 Wn.App. 137, 140, 777 P.2d 8 (1989).

c. Equalization payment. Finally as to the remaining issue of property and debt distribution, Mr. Green argues on pages 41 and 42 that the superior court abused its discretion when it improperly calculated the extent of community and separate property, as well as the award of a transfer or equalization payment to the wife, resulting in an unfair and un-equitable distribution of property. This issue relates to the court's finding of fact no. 20 [CP 197], and the court's oral decision entered on December 3, 2009. [CP 165-93]. Once again, Mr. GREEN fails to properly assign error to these factual determinations of the court. See, RAP 10.3(a)(4), 10.3(g) and 10.4(c). Thus, these findings concerning the ultimate distribution of property and debt, and accompanying transfer payment to the wife, should now be considered verities. See, State ex rel. Bain v. Clallum County Bd. of Cy. Comm'rs., 77 Wn.2d 542, 542, 463 P.2d 617 (1970); Iverson v. Graham, 59 Wn.2d 96, 366 P.2d 213 (1961); Wilson v. Elwin, 54 Wn.2d 196, 338 P.2d 762 (1959). see also, State v. Ross, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000).

Contrary to Mr. GREEN's claim that "[t]here is no explanation as to how the court reached the equalization payment," the record is clear in

this regard. A simple review of the court's December 3, 2009, oral ruling [CP 184-90], and finding of fact no. 20 [CP 197] bears this out.

Furthermore, when framing a distribution of property and debt under RCW 26.09.080 the court is not required to divide assets evenly. In re Marriage of Mansour, 126 Wn.App. 1, 14, 106 P.3d 768 (2004). Rather, it is simply obligated to value and distribute the assets and debts fairly and equitably, as the court did in this case. This is the court's paramount concern. Id.; see also, In re Marriage of Williams, 84 Wn.App. 263, 270, 927 P.2d 679, review denied, 131 Wn.2d 1025 (1996). Mr. GREEN overlooks this fact.

Given the duration of the parties' marriage, along with the disparity between community and separate assets and the comparatively diverse economic circumstances of the parties, the court's determination that an equalization payment to the wife was clearly in order in this instance. [CP 184-90, 197, 205]. Thus, once again, it cannot be said that the decision of the court on the issue of distribution, including the award to the wife of a transfer payment, was based upon untenable grounds or for untenable reasons. See, State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Gillespie, 89 Wn.App. 390, 948 P.2d 1338 (1997). For these reasons, the decision of the trial court concerning distribution of assets and debt should be affirmed. RAP 12.2.

Counter-issues no. 1, 2 and 8. Finally, on pages 42 through 47 of the "Appellant's Brief," Mr. GREEN argues that the superior court abused

its discretion in requiring him to pay \$1,500 in monthly maintenance for a period of one [1] year. At the time the court entered its temporary order on August 29, 2008, the determination was made that, in addition to an award of \$2,500 in attorney fees, the wife was in need of \$1,500 a month in maintenance and the husband had the ability of pay the same. [CP 105-08, 109]. Mr. GREEN has acknowledged that he had no trouble paying this obligation to his wife during the pendency of this case, nor did he have any trouble paying her attorney fees as required under the same temporary order. [RP 474, 496-97]. He has also admitted that the only real change in his financial ability to pay maintenance was his decision, contrary to his parents' wishes [RP 497], to end taking the tax exempt gifts from their 1995 trust, and to not take any trustee fee for his services to that trust. [RP 474-76, 477].

Suffice it to say, Mr. GREEN's self-imposed poverty is entirely inconsistent with the purpose and intent of RCW 26.09.090. Furthermore, and as he acknowledges on page 46 of his brief, an award of maintenance rests within the discretion of the trial court, and will not be disturbed unless there has been a manifest abuse of such discretion. In re Marriage of Estes, 84 Wn.App. 586, 929 P.2d 500 (1997). Based alone upon the nature of Mr. GREEN's claimed "inability" to pay, as well as the 46 year duration of this marriage, it is pure sophistry for Mr. GREEN to now claim that the court abused its discretion in awarding Ms. GREEN one [1] additional year of spousal maintenance ending in February 2011. Id.

E. REQUEST FOR AWARD OF ATTORNEY FEES

In accordance with the requirements of Rule 18.1(b) of the Washington Rules of Appellate Procedure [RAP]), respondent, JANICE GAI GREEN, respectfully requests that she be awarded her costs and expenses, including her reasonable attorney fees, incurred on this appeal as are duly authorized under the provisions of RCW 26.09.140. See also, Kruger v. Kruger, 37 Wn.App. 329, 333, 679 P.2d 921 (1984). She remains in financial need and appellant husband has the corresponding financial ability to pay said fees and costs, especially in light of the fact he can readily afford to prosecute this appeal regardless of his present self-imposed poverty. An award of such fees are further warranted under RAP 18.9(a), as well as RCW 4.84.185 and Rule 11 of the Washington Civil Rules for Superior Court [CR], insofar as the issues raised on this appeal are entirely frivolous, and brought only for the purpose of delay, since no manifest abuse of discretion has been shown by appellant concerning the decisions of the superior court in this case.

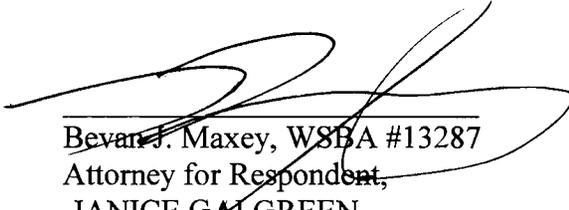
F. CONCLUSION

Based upon the foregoing points and authorities, the respondent, JANICE GAI GREEN, respectfully requests that the subject decisions and judgment of the superior court of Spokane County, State of Washington, be affirmed for lack of any showing of manifest abuse of discretion, or

failure of the court to properly apply the law to the facts of this case, and accordingly that this appeal be dismissed with prejudice. Under the authority cited in Part E of this brief, the respondent further requests that she be awarded her costs and expenses, including a reasonable attorney fee, as against the appellant, HAROLD JOSEPH GREEN, in his having forced her to respond and defend in this warrantless appeal.

DATED this 29 th day of November, 2010.

Respectfully submitted:



Bevan J. Maxey, WSBA #13287
Attorney for Respondent,
JANICE GAI GREEN