

**FILED**

SEP 02 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

**COA No. 292941**

---

In re the Marriage of: **PATTI ANN MANUS,**  
*Respondent.*

**v.**

**EDWARD LEE MANUS,**  
*Appellant,*

---

**APPELLANT'S OPENING BRIEF**

---

**JoAnne G. Comins Rick  
Halstead & Comins Rick, P.S.  
P.O. Box 511  
Prosser, WA 99350-0511  
(509) 786-2200  
Attorney for Appellant  
Edward Lee Manus**

**FILED**

SEP 02 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

**COA No. 292941**

---

In re the Marriage of: **PATTI ANN MANUS,**  
*Respondent.*

**v.**

**EDWARD LEE MANUS,**  
*Appellant,*

---

**APPELLANT'S OPENING BRIEF**

---

**JoAnne G. Comins Rick  
Halstead & Comins Rick, P.S.  
P.O. Box 511  
Prosser, WA 99350-0511  
(509) 786-2200  
Attorney for Appellant  
Edward Lee Manus**

## TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
I. Identification of Parties.....	1
A. Appellant .....	1
B. Respondent .....	1
II. Decision Below .....	1
III. Issues Presented for Review.....	1
IV. Assignment of Error.....	3
V. Statement of the Record.....	5
A. Basics of the Marriage at Issue.....	5
B. Community Debt and Assets of Prior Marriage.....	6
C. Employment of Patti Manus and Edward Manus .....	7
D. Bank Accounts During Marriage.....	8
E. Residence Purchased During Marriage.....	10
F. Separation and Agreement As To Division of Property.....	11
G. Default Decree and Violation of Agreement.....	13
H. Trial Proceedings.....	15
J. Motion to Reconsider Trial Ruling.....	18
VI. Summary of Argument.....	19

## TABLE OF CONTENTS

	<b>Page</b>
VII. Argument.....	20
A. Standard of Review.....	20
B. It Was Error to Award Maintenance to Former Wife .....	22
C. A Separate Debt That Spouse Has Fully Satisfied And Did Pay from His Half of Community Property Is Not Subject to Property Division.....	26
D. Recreational Gambling Was Neither Marital Misconduct Nor Wasting of the Community Funds .....	29
E. The Trial Court Failed to Consider All of the Community Property.....	36
F. Awarding Attorneys' Fees to Wife Error.....	40
VIII. Conclusion.....	40
Appendix A .....	43

## TABLE OF AUTHORITIES

<b><u>Case Law:</u></b>	<b><u>Page(s)</u></b>
<i>In re Marriage of Brewer</i> , 137 Wn.2d 756, 976 P.2d 102 (1999).....	20
<i>In re Marriage of Bulicek</i> , 59 Wn. App. 630, 800 P.2d 394 (1990).....	24
<i>State Ex. Rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	20, 21, 22
<i>In re Marriage of Clark</i> , 13 Wn. App. 805, 538 P.2d 145, <i>review denied</i> , 86 Wn.2d 1001 (1975).....	32, 35
<i>In re Marriage of Estes</i> , 84 Wn. App. 586, 929 P.2d 500 (1997).....	25
<i>In re Marriage of Kaseburg</i> 126 Wn. App. 546, 108 P.3d 1278 (2005).....	27, 28, 30, 31, 37
<i>In re Marriage of Konzen</i> , 103 Wn.2d 470, 693 P.2d 97 (1985) <i>cert. denied</i> , 473 U.S. 906, 105 S. Ct. 3530 (1985).....	20
<i>MacKay v. MacKay</i> , 55 Wn.2d 344, 347 P.2d 1062 (1959).....	22, 40
<i>In re Marriage of Steadman</i> , 63 Wn. App. 523, 821 P.2d 59 (1991).....	35, 40
<i>In re Marriage of Tower</i> , 55 Wn. App. 697, 780 P.2d 863 (1989).....	20
<i>In re Marriage of Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984).....	24
<i>In re Marriage of White</i> , 105 Wn. App. 545, 20 P.3d 481 (2001).....	27

**TABLE OF AUTHORITIES**

	<b>Page</b>
<i>In Re Marriage of Williams,</i> 84 Wn. App. 263, 927 P.2d 679 (1996), <i>review denied</i> , 131 Wn.2d 1025 (1997).....	29, 31
<b><u>Statutes</u></b>	
RCW 26.09.080.....	2, 21 31, 33, 36, 38
RCW 26.09.090.....	2, 20, 23, 25, 27

## **I. IDENTIFICATION OF PARTIES**

**A. Appellant.** The Appellant is Edward Lee Manus, who was the Respondent husband at Superior Court.

**B. Respondent.** The Respondent is Patti Manus, who was the Petitioner at Superior Court.

## **II. COURT'S DECISION BELOW**

This is an appeal from a dissolution and property division of a six year marriage with no children of this marriage. In the marriage, both spouses were employed, and continued in their respective employment through the separation and final divorce. The trial court awarded maintenance to the Respondent wife. The trial court found waste by the Appellant husband, and credited the wife with the same amount and awarded all the profit from sale of residence to wife. The trial court made other determinations as to property division. The Appellant appealed.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Following a six-year marriage, with no children, where the spouse is both healthy and employed is there any basis under

RCW 26.09.090 for awarding separate maintenance for said spouse?

2. Can an award of spousal maintenance stand, when the record is insufficient to show wife has a need and that the husband has the ability to pay?

3. In a marital property division, under RCW 26.09.080 does the court lack jurisdiction to consider and allocate a debt that was paid in full, three years before the marriage ended, and paid with the husband's half of the marital assets beyond those funds needed to pay the community debts?

4. In a marital property division is it inequitable to consider the entire amount in retirement as an assets, when (a) a former wife is entitled to a portion of that retirement pension, (b) a substantial portion of that pension was liquidated in the marriage at issue, and (c) the gain of the remaining pension was due to the increase in the value of retirement asset rather than additional contribution?

5. Does all gambling with community funds constitute wasting of marital assets?

6. When patronizing casinos and episodic gambling were a joint entertainment expenses during a marriage, did the trial court improperly considered the husband's gambling as constituting "waste" in making the property division of the parties' assets?

7. When the spouse did not petition for attorney's fees, and there has been neither a determination of prevailing spouse's need nor the responding spouse's ability to pay, is the court without authority to grant prevailing party attorney's fees.

#### **IV. ASSIGNMENT OF ERRORS**

1. The trial court erred in awarding spousal maintenance to the wife; the record does not support that wife had a need for maintenance, nor that the husband had the ability to pay.

2. In a six-year marriage, it was error to consider and attribute to the husband a \$15,000 debt, which had been paid in full three years before the marriage ended.

3. The Court erred in valuing the community property interest in the husband's pensions and retirement accounts at \$45,000, apparently ignoring the prior QDROs dividing the interest in these assets between the husband and his former wife.

4. It was error to ignore the community interest in the wife's pension acquired during marriage, awarding it entirely to the wife.

5. When the marital couple jointly patronized casinos and knowingly engaged in gambling it was error to make a property division based upon marital fault by declare that patronizing Casinos and gambling to be waste by the husband.

6. The record does not establish that the husband spent \$25,000 over the six years of marriage on gambling, thus an error to find that to be a waste of marital community assets.

7. Alternatively, if \$25,000 was spent on gambling and patronizing casinos in the six years of marriage it was error to find that to be waste, since both the husband and wife voluntarily patronized casinos as part of their marital community entertainment.

8. It is error to hold that either spouse was entitled to a certain level of "money management", *e.g.* the trial court's criticism that the husband "wasn't a very good money manager."

9. It is error to award \$ 5000 in attorneys' fees to the wife, when the petition did not request such relief; and when the record does not support that the wife had a need or that the husband had the ability to pay.

10. It was error to deny the husband/Respondent motion for reconsideration of the oral ruling at trial.

## **V. STATEMENT OF THE RECORD**

### **A. Basics of the Marriage at Issue**

Edward Lee Manus (Herein "Ed Manus") and Patti Manus were married in September 2000. RP 49:13-14; 60:17-18. They dated for a year before marriage. RP 85:15-17. Just short of six years of marriage, they separated in August 2006. RP 5:19-20; 44:4-6; 96:19-20; 121:7-8. No children were born of this marriage between Ed Manus and Patti Manus. CP 3; 121. This was the first marriage for Patti Manus.

July 2000, Ed Manus finalized the divorce from his first wife, Laurie Marshall, after the seven-year marriage ended in 1999. From that marriage, he had two children, and he was responsible for paying monthly child support for them. RP 14:17, 44:11-17, 50:7-12, 76:6-15; CP 85: Ex 1 Tab 11. Ed Manus was also awarded a substantial amount of visitation with his children, which he also exercised during his marriage to Patti Manus. RP 111:5-11.

#### **B. Community Debt and Assets of Prior Marriage**

The child support for his two children was \$450 per month. RP 44:14-23. Ed Manus also had responsibility of approximately \$15,000 in community liabilities for that marriage with Laurie Marshall. RP 45:19-21, 46:14-19, 75:5-20, 76:2-5; CP 166-167. Ed Manus paid off that \$ 15,000 by April of 2003, which was in 32 months into the marriage with Patti Manus. *Id.*

Ed Manus had a 1997 truck, which had a loan on it and he owned before the marriage. RP 60:19-25, 61:1-8, 62:5-7; CP 85: Ex 3. The truck loan payment was \$370 per month. RP 60:19-25. Ed Manus had acquired pensions and retirement accounts during his

first marriage, which were divided by qualified domestic relations orders [QDROs] with his first wife, Laurie Marshall. RP 50:18-25; 51:1-17; 55:17-25; 56:1; 57:12-17.

Patti Manus came into the marriage with an old Dodge Neon, which was worth \$600. RP 77:23-25. She came also with approximately two thousand dollars (\$2,000) in credit card debt. RP 13:6-15. She had separate assets of approximately fifty thousand dollars (\$50,000) in retirement savings and investments from Nordstrom. RP 9:4-5; 95:14-17.

### **C. Employment of Patti Manus and Edward Manus**

Before the marriage, Patti Manus worked for Nordstrom. RP 6:1,11-14. She had acquired pension and retirement savings. RP 6:15-18, 7:2-5, 15-25, 8:10-20. Shortly before the marriage, Patti Manus changed her job to that with the Sunnyside Housing Authority. RP 6:1. Throughout the marriage, and after the divorce, Patti Manus was employed by Sunnyside Housing Authority. RP5:10-20. At the time of trial, she was earning \$17.36 per hour or approximately \$36,000 per year. RP 5:13-17.

Ed Manus was a Journeyman Lineman and belonged to the Local 77. RP 52:1-5, 57:6-9. Over the years, he would change employers with availability of work through the union. RP 57:1-25. At the marriage and after Ed Manus was employed by Benton County PUD. RP 21:1-4, 52:8-12. During his marriage, he worked for three different construction companies, with very little down time between employers. RP 21:8-15. Before the marriage and up until his job with the PUD ended, Ed Manus earned sixty to seventy thousands per year (\$60,000 to \$70,000) per year. RP 21:18, 85:12-14. CP 23. His income continued the same when he worked in the private sector union jobs. RP 85:12-16; CP 15, 22; CP 85:Ex 6.

#### **D. Bank Accounts During Marriage**

Before the marriage, Patti Manus had a joint checking and savings account with her mother. RP 108:16-18. CP 85:Ex 8, Ex 9. She maintained the same account as her separate account during her marriage to Ed Manus. RP 64:11-17, 87:10-12, 88:2-7. CP 85:Ex 8, Ex 9. Throughout the marriage, Patti Manus' paychecks were all deposited into her said separate checking account. RP 64:11-25;

65:1-6, 88:2-7. Ed Manus was never given access to this said separate account of Patti Manus. RP 64:21-23, 88:5-7. During the marriage, Patti Manus never transferred money from her checking account to their joint account to pay for groceries, meals, clothing, supplies and home maintenance/improvement, utilities, recreation, etc. RP 74: 22-25, 75:1-4, 88:2-4, 92:11-14, 93:7-13, 94:2-7, 105:1-14.

On the other hand, after these parties married, Ed Manus put Patti Manus name on all his bank accounts, making them joint accounts. RP 32:23-24, 33:8-19, 65:8-16, 67:10-13, 88:8-13. In the marriage, Patti Manus had access to the joint account ATM cards, and the bank statements. She would write checks on the joint account. RP 65:17-25, 66:1-6, 68:11-15, 88:8-13, 117:13-14.

Throughout the marriage, all Ed Manus' paychecks and earnings were deposited into their joint accounts. RP 66:5-16, 68:7-10. All the needs of the community, other than the few items paid for by Patti, were paid from that joint account. RP 14:7-22; 70:15-23, 88:8-16, 92:11-14, 104:15-25, 106:21-22, 109:2-15.

In marriage, Patti Manus paid another thirteen thousand five

hundred dollars (\$13,500) into her 401 K retirement fund. RP 49.

From 2000 to September 2005, the couple lived in Ed Manus' mother's property. Patti Manus paid approximately \$300 per month for rent<sup>1</sup>, \$50 per month for the cable bill, and contributed towards the groceries. RP 14:7-11, 104:18-20, 106:16-18, 109:3-5, 6-10. The rest of her income was spent at her discretion on her own personal wants. RP 68:16-25. All the other community needs and obligations were paid out of the joint accounts, where Ed Manus deposited his paychecks and earnings. RP 14:14-22, 70:15-23, 92:11-14, 109:11-14. While married Patti Manus never complained she was in need of money. RP 15:14-19, 16:1-5, 67:1-9.

#### **E. Residence Purchased During Marriage**

In September 2005, the parties purchased a family residence, which was on seven (7) acres of land, for \$88,000. RP 69:11-13. The resulting mortgage was approximately \$675 per month, which was withdrawn automatically from the parties' joint account. RP 68:4-6.

---

<sup>1</sup> When the residence was purchased in September 2005, the house payments automatically came out of the joint account. Patti Manus payment of rent stopped at that point. RP 67, 68, 72.

Over the next year, Patti Manus contribute a total of \$337 towards the mortgage from her Nordstrom's checking/savings account. RP 66:7-13, 67:22-25, 68:1-3, 72:24-25, 73:1.

Soon after the closing on the property, Ed Manus withdrew \$25,000 from his pension, netting about \$20,000 after taxes and penalties. RP 54:19-24. Those monies were used as follows. A sizable portion (\$13,000) was used to pay towards the repairs and upgrades to the residence and also to purchase a used tractor for use on the property. RP 69:22-25, 70:1-4, 10-17,20-25, 71:1-5, 9-12. Four thousand (\$4,000) was used to pay Patti back for the portion of the down payment that she contributed from her checking/savings. RP 71:13-20. The remaining \$3,000 was used by Ed Manus and Patti Manus for a trip to Las Vegas. RP 71:6-7.

#### **F. Separation and Agreement as to Division of Property**

Parties separated in August 2006. Patti refused to leave the residence, so Ed Manus moved out. RP 72:15-18. He continued paying the mortgage. RP 72:19-22. Additionally, Ed Manus continued to make the payments on the car loan for the Chrysler

Concorde that Patti Manus drove, and was purchased during the marriage. RP 63:5-13, 18-25, 73:2-4, 8-9, 92:11-17, 105:8-9.

During the separation, Ed Manus kept up the payments on all the community debts, *e.g.* the monthly house payments of \$675 and the Concorde (\$350 per month). RP 63:18-25, 72:19-22, 73:2-4, 92:11-17, 105:8-9, CP 85: Ex 2. This benefitted Patti Manus by approximately twelve thousand dollars (\$4200: Chrysler; \$8100: Mortgage). CP 85: Ex 2, Ex4. Furthermore, during the separation, Patti Manus saved nine thousand one hundred dollars (\$9,100). RP 82:22-25, 83:1-6, 88:18-23, 101:23-25, 102:17-25. CP 85: Ex1. Tab 6, Ex8, Ex9.

The Parties agreed to sell the home and divide the proceeds. (RP 72:12-14, 121:10-16, CP 64-66) and to each keep their respective pensions and personal property in their possession (RP 80:11-14, 104:6-14). After reaching the above agreement, Patti Manus went to a lawyer. RP 80:15-21. To save money, she suggested that they use one attorney to get their divorce done. RP 80:15-21; 90:1-14. Ed agreed; they used Patti's attorney. RP 80:25, 81:1-5, 90:1-14.

### **G. Default Decree and Violation of Agreement**

Patti Manus did not follow through on the agreement that she reached with Ed Manus. RP 81:6-8, 10-23, 86:3-7. June 2007, Patti Manus secured a default judgment and Decree contrary to the agreement against Ed Manus. RP 81:10-23, 82:6-11, 89:14-18, 23-25. Decree, entered by default, included an award of \$1000 per month for 12 month maintenance to the wife. CP 53. Then July 2007, Patti Manus sold the house for \$137,500<sup>2</sup>. RP 27:7-15; CP 85: Ex 1 Tab21. Thereafter, Patti Manus kept for her own the net profits of \$ 49,500, as well as keeping the escrow rebate from the bank mortgage of approximately \$1900. RP 27:16-24, 89:6-13, 103:17-19.

Patti Manus kept her pension accrued during the marriage \$13,500. RP 49:3-7; CP 85: Ex 1 Tab 8. She awarded herself the Chrysler Concorde purchased during the marriage, and paid off by Ed prior to the default Decree. In the decree, she gave Ed Manus no credit for either of these benefits to her. CP 50-59.

---

<sup>2</sup> Patti Manus never provided proof how she was able to close the sale on the residence without the knowledge and signature of Ed Manus. RP 103:22-25; 104:1-5.

Mr. Manus moved to vacate the decree as soon as he received copies of the default Decree that it had been entered. RP 122:1-6. The motion to vacate was filed in July 2007. CP 64-70. After a substantial amount of discovery had been requested and provided between the parties, such as would have occurred during the discovery prior to litigation, the Court granted the motion to vacate. CP 79-81. The Commissioner found the property division in the Decree to be unfairly disparate between the parties, favoring the wife. CP 79-81. The Commissioner's ruling vacated the property division and left the spousal maintenance to also be considered at trial. CP 102-103.

In filing for the dissolution, at the filing for the vacation of the default, at the hearing to vacate and thereafter up until arguing to Judge Matheson at trial, Patti Manus neither petitioned nor asked for her attorneys fees. CP 101

Trial was held in May 2010. CP 83-84.

## **H. Trial Proceedings**

The trial lasted a day. The trial court did not allow cross-examinations to follow the direct examination of the respective witnesses. RP 2:11-21. The following are further evidentiary matters on the matters that are at issue in this appeal.

The parties had a joint checking account with U.S. Bank, and each had an ATM card. RP 65:12-25. Patti Manus created a spreadsheet to show the amount of withdrawals from ATM machines located at or near restaurants, bars, casinos and banks. RP 34:6-24. Patti Manus' Counsel suggested Ed Manus was making withdrawals on the ATM in casinos and therefore he was gambling. RP 113-17. Ed Manus testified that he did some gambling, but the bulk of the ATM withdrawals were to obtain cash to pay for other activities such as eating, recreation with Patti Manus, his children (bowling) and the remaining cash was used to pay various community bills. RP 74, 113-117, 122-23. Interestingly, the spreadsheet also showed that, when the Ed Manus closed that joint account and opened an individual account in his name alone,

the ATM withdrawals at these same locations were a fraction of what was withdrawn before the Patti Manus' access was curtailed. RP 123. The trial court found over the six years of marriage Ed Manus wasted \$25,000 in gambling. RP RULING 2-5; CP 124. That amount worked out to an average of \$300 a month.

Ed Manus was a journeyman Lineman and worked out of the Local 77. RP 52:1-5; 57:6-9. All contributions to his retirement would go into his union retirement. RP 57:6-11. Ed Manus' NEAP Retirement, HRAVERBA, and PERS 2 pension plans were separate assets from his first marriage, and divided by QDROs with his first wife. CP 85:Ex7.

The substantial increase in the value of these plans was due to the accumulated income earnings, rather than to the contributions made during the marriage with Patti Manus. For example, the NEAP plan had a balance at separation of \$50,795; only \$4676 of that amount was a contribution made during the marriage. CP 85: Ex 7. Moreover, the ICMARC 457 Plan had a balance of \$25,500, which was cashed out and used by the marital

community for the improvements, repairs and maintenance of the family residence purchased in 2005. RP 54:18-24, 93:9-14.

During the marriage, Patti Manus paid \$13,500 into her 401K. RP 49:3-7; CP 85:Ex5. Ed Manus contribution to his retirement during this marriage was \$4,676. CP 85: Ex 7

At the end of evidence and after argument of Counsel, the trial court found that Ed Manus allegedly "wasted" the marital community by patronizing casinos and gambling. The court overlooked that Patti Manus was also patronizing the casinos with her then husband, and at times other family members would also go with the couple. RP: RULING 2-6. On this record as to the property division the trial court found that

- a. Ed Manus' gambling activities constituted "waste", *ala* marital misconduct and made its property division accordingly;
- b. Patti Manus was awarded the entire profit from of the sale of the residence forty-nine thousand five hundred dollars(\$ 49,500);

- c. No credit was given to Ed Manus for the community debts he paid during the separation, *e.g.* the house payment or the payments on the Chrysler Concorde;
- d. No credit was given to Ed Manus for cashing out \$25,536 of his retirement that was entirely contributed to the marital community, including the improvements of the marital residence;
- e. The entire \$13,500 paid into Patti Manus 401K during the marriage was awarded to her;
- f. Patti Manus was entitled to separate maintenance of twelve thousand (\$12,000);
- e. Attorneys fees of five thousand dollars (\$5,000) were awarded to Patti Manus.

RP RULING:2-6, CP 106-117, 118-128.

**J. Motion to Reconsider Trial Ruling**

After the oral Order was entered, Ed Manus timely moved to reconsider. CP 87-104. All of Mr. Manus request was denied with a minor reduction in the amount owing on the separate

maintenance. CP 105. The separate maintenance was reduced from \$12,000 to \$8,000. CP 120. A timely appeal was filed.

## **VI. SUMMARY OF ARGUMENT**

This was a short-term marriage of 6 years. Both were employed and in good health. The wife's living standards were not compromised after the marriage ended. Under RCW 26.09.090 she was not entitled to separate maintenance.

The husband and wife were both patronizing casinos as part of their entertainment. The husband contests the amount of claimed gambling, and the wife was also gambling. Even if, the amount of gambling was at the amount found that is \$300 per month. The husband earned substantial funds, so there was no waste to the marital community. The husband was entitled to have the profit from sale of the marital residence. The trial court lacked jurisdiction to allocate a liability that had been extinguished three years before the marriage ended. The trial court failed to consider and allocate the vehicle purchased during the marriage with community assets.

## VII. ARGUMENT

### A. Standard of Review

The issues on appeal concern property division in a dissolution proceedings and imposition of attorney's fees. In these matters generally, the trial court has broad discretion when distributing property and liabilities in dissolution proceedings. RCW 26.09.080; *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999); *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97 (1985). The distribution of property by the trial court will not be disturbed unless there has been a manifest abuse of discretion. *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). A trial court abuses its discretion only if the decision is manifestly unreasonable or is based on untenable grounds or made for untenable reasons. *Id.* Appellant Mr. Manus submits that as to the division of the property following the sale of the residence, the allocation of benefits, the finding of "marital misconduct", awarding maintenance and attorneys fees were untenable.

In *State Ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d

775 (1971) the Court observed that:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

The appellate issues cover whether using Consumer Credit Counseling services to pay off pre-marital debt is "marital misconduct" and whether engaging in recreational legal gambling is proof of "marital misconduct". Appellant contends it was an abuse of discretion for the to find his payment of approximately \$ 15,000 in pre-marital debt over 32 months was proof that he had history of mismanaging his monies. Here, the proof construed in the light most favorable to Patti Manus is that in the marriage Ed Manus was making at a minimum \$5,000 a month and his average expenditure per month on gambling was \$300. Under the circumstances, Mr. Manus submits it was an abuse of discretion to find he engaged in "marital misconduct" by gambling \$300 per month.

On review of the issues Mr. Manus submits that the law is that as to judicial discretion means

. . . a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.

*MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959); and also

*State Ex. Rel. Carroll*, 79 Wn.2d at 26.

**B. It Was Error to Award Maintenance to Former Wife**

RCW 26.09.090 provides in part

. . . The maintenance order shall be in such amounts and for such periods of time as the court deems just, **without regard to misconduct**, after considering all relevant factors including but not limited to . . . (Emphasis added.)

Thus according to legislature, the award of maintenance is based upon "objective", not perceived "moral" findings. The statements of the trial court make it abundantly clear that separate maintenance was awarded due to the trial court's opinion about alleged marital misconduct of Ed Manus. RP RULING 2-5.

The circumstances of the separation are as follows. Patti Manus laid claim to the residence, so Ed Manus moved out. Nevertheless, Ed Manus continued to make the payment on the home loan. Patti Manus contributed nothing. Her housing was free for the next year. Ed Manus continued to make the payments on Patti Manus' new vehicle. Thus her hard vehicle cost was nothing. The two major living expenses for Patti Manus were covered by Ed Manus for sometime after the separation.

At separation, Ms. Manus at \$ 15.00 per hour made (\$2,700 a month). Then she had neither house payment nor car payment. She no longer contributed to the support of children. Mr. Manus made \$5,000 per month. At separation, Ed Manus had his housing and his truck payment. He had child support \$450 per month, plus the food and other cost of when his two children were residing with him, which was for a considerable amount of time<sup>3</sup>. Wife's standard of living did not change, husband's standard did.

---

<sup>3</sup> At the 2010 trial, it was established that Mr. Manus had remarried and was now supporting four children. RP 84-85

RCW 26.09.090 enumerates the factors to consider in award maintenance, it is discretionary as to whether under those factors the trial court award maintenance to either party. *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990).

Awards of maintenance are "a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). This was a six-year marriage. Ms. Manus had a well paying job, savings, her major living expenses paid by Mr. Manus for the first year after marriage. Her health was good. She had savings, also had her retirement from Nordstrom, and what she had accumulated in the 401k during the marriage.

Contrary to the law, the trial court awarded maintenance based upon alleged "marital misconduct", e.g. Mr. Manus was allegedly a poor money manager. RP RULING 2-5. "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." *Bulicek*, 59 Wn. App. at 633. It was not just to award

maintenance to Patti Manus based upon the record she submitted.

The law recognizes that trial court may properly consider the property division when determining maintenance, and may consider maintenance in making an equitable division of the property." *In re Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997). This was a relatively short-term marriage of 6 years. Here, as addressed above Patti Manus lived in the property for free. By the time of trial, she had sold the property realizing a \$49,000 profit, plus other attendant accumulations. Rather than looking at the circumstances, once the parties separated, *e.g.* 2006, the trial court looked to Patti Manus circumstances four years later in 2010. Meanwhile, ignored Mr. Manus' circumstances in 2006 and 2010.

Objectively, Ms. Manus never owned a home before marriage. In marriage, she was a co-owner in an \$88,000 property. More than a year after the marriage ended, she voluntarily decided to buy a property that cost \$140,000. She wanted to keep the payments down to \$402 per month on her then salary of \$3,020 per month, *e.g.* \$17.36 per hour full time 174 hours a month. She had

no car payment. She left the marriage free of debt. Patti Manus felt sufficiently comfortable with her circumstances to cash out her Nordstrom retirement. Meanwhile, Mr. Manus had no funds to contribute to a down payment on a home of his own, because Patti Manus kept all the sales proceeds.

Under RCW 26.09.090, there was no tenable basis to find Patti Manus had a need to be awarded maintenance to maintain her standard of living following the separation. It was an abuse of discretion to award any maintenance to Patti Manus.

**C. A Separate Debt That Spouse Has Fully Satisfied And Did Pay from His Half of Community Property Is Not Subject to Property Division.**

In considering the property division the trial court found:

The Court also finds that the marital community paid separate obligations of the Respondent in the amount of \$15,000.00, a factor the Court has considered in distributing the parties community and separate assets.

CP 124.

It is basic; all of the community and separate property that exist at the time of trial. If "one or both of the parties dispose of an

asset [liability] before trial, the court simply has no ability to distribute that asset at trial." Cf. *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001), and also *In re Marriage of Kaseburg* 126 Wn. App. 546, 108 P.3d 1278 (2005).

Obviously, the respective separate property debts of individuals are not extinguished upon marriage. For an individual, who earns sixty to seventy thousand a year, a long-term debt of \$15,000 is not in of itself an indication of mismanagement of money. Here, Patti Manus testified she thought that Ed Manus was bringing \$60,000 of debt to the marriage. Apparently, at marriage a debt that size did not dissuade her decision to marry Ed Manus. The evidence is that he only had a debt of \$15,000 plus the money owing on his vehicle. The debt was paid off in the first 32 months of the marriage. Presumably based upon the testimony the marital community had income of \$7,700 per month during the term of the debt payment. Therefore, Ed Manus' half of the marital community income was \$3850. After payment of the community debts, *i.e.* half of the housing, utilities, food and entertainment, Ed

Manus had more than enough remaining in his half to pay the \$477 month payments. It cannot be found that the marital community went wanting because of payment of this debt.

In *Kaseburg*, a couple acquired \$850,000 in debt for the building of a home. The wife filed for dissolution. Thereafter, foreclosure proceedings were commenced against the marital residence. Before the trial, the residence was lost in foreclosure. Thus, the residence, including the debt was judicially disposed, before the trial. In part, the appellate issue concerned whether the trial court had jurisdiction to distribute the foreclosed residence in the dissolution. *Kaseburg* reversing the trial court held "If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial." 126 Wn. App. at 556.

Ed Manus' separate debt of \$15,000 was extinguished three years before the marriage ended. At trial the debt did not exist. The trial court lacked jurisdiction to factor this debt in the property distribution. Ignoring the basic law, the trial court manifestly abused its discretion.

**D. Recreational Gambling Was Neither Marital Misconduct Nor Wasting of the Community Funds**

The trial court found:

[T]he husband wasted the sum of \$25,000 of community assets by Husband's gambling activities during the marriage. While the assets so wasted no longer exist, the Court finds that Husband should be charged with such waste in determining a fair and equitable distribution of the parties' community assets. CP 124:13-17.

Gambling is legal in the State of Washington, and even encouraged by the State, *i.e.* lottery sales. *In re Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679 (1996). It is a legalized method of entertainment. It is common that citizens of Washington are patronizing Casinos on Indian Land within the gross borders of Washington. The public, and the government, see patronizing Casinos as an acceptable venue for entertainment, dining and gambling. On the other hand, the trial court found "I'll find that there's at least \$25,000 of waste gambling, casino". RP RULING: p. 2:1-2; CP 124. The trial court then made further observations and comments singling out Mr. Manus patronization of Casinos, which were clearly comments that can only be characterized as the trial

court's view of marital misconduct. RP RULING p. 5:5-25. With all due respect, Mr. Manus submits the trial court's findings and conclusions were contrary to the law and error. Errors of law were made in the division of the assets of the marital community, when the court viewed a legal activity as proof of waste of marital assets.

Patti Manus was going to casinos with Ed Manus and she knew he was gambling. Patti Manus also gambled, but she contested how much she was gambling. During the marriage the couple would go to casinos with their family, *i.e.* his children and her mother. Obviously, Patti Manus knew she and Ed Manus were often going together to gambling establishments to eat and for entertainment of which some was gambling. It is manifestly unreasonable to find that Mr. Manus patronizing of casino was waste and ignore the fact that Patti Manus was patronizing the casino at the same time and with her then husband.

The present assertions by Patti Manus that Ed Manus was engaging in "waste" are legally similar to those in *Kaseburg*. In *Kaseburg* the wife opined that husband engaged in fraud and

therefore waste when he borrowed \$850,000 from his parents over time to cover their high standards of living and to pay for the remodeling of their home. Then during the marriage, the wife along with her husband executed a note for \$850,000 and Deed of Trust in favor of his parents on their home. In holding, the husband had not committed waste in obtaining the loans from his parents during their marriage, the *Kaseburg* Court stated:

In summary, we affirm the general principle that in a dissolution action a court has discretion to consider allegations of concealment, fiscal misconduct, and waste of community debts and assets. But we hold that it is an abuse of discretion to allow a challenge on these grounds when the allegations and evidence focus on debts and property that are not before the dissolution court and are extinguished because of a statutorily proper and unchallenged foreclosure action under chapter 61.24 RCW.

*Kaseburg*, 126 Wn. App. at 561.

Washington appellate courts, have considered circumstances wherein one spouse engages in lawful gambling with community and the division of property under RCW 26.09.080. *In re Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679 (1996). The analysis

begins with the premise that it is “recognize that consideration of each party's responsibility for creating or dissipating marital assets is relevant to the just and equitable distribution of property.” *Id.* The trial court, and this court, reminded that the distribution of property is done without consideration of marital misconduct. *In re Marriage of Clark*, 13 Wn. App. 805, 808, 538 P.2d 145, *review denied*, 86 Wn.2d 1001 (1975), see also RCW 26.09.080(1). Then as the *Clark* Court observes that legislative enactment shifts the reason for a marriage dissolution from one of fault based to that of irretrievable breakdown. 13 Wn. App. at 808. The *Clark* Court observes that “the fact that ‘fault’ is no longer a relevant query does not preclude consideration of all factors relevant to the attainment of the just and equitable dissipation of marital property.” *Id.* Thus, the question is whether waste is proven with a showing that a spouse has potentially spent an average of \$300 per month in patronizing casinos and gambling.

Here, the marital community over six years of marriage had a combined monthly income of \$7,700 to \$8,533 per month. The

expenditure of an average of \$300 per month on gambling is consistent with a couple going to a dinner and movie or snow skiing several times a month or many of the other common and uncommon forms of entertainment. Here the marital community was neither put in debt due to the husband's gambling expenditures, nor did the wife do without any of her basics needs or wants. Of equal consideration, Ed Manus brought more in earnings to the marriage through out the marriage. It cannot be concluded that Ed Manus was engaging in "waste", when even with the gambling, Patti Manus still had more marital funds available to her than she earned on her own.

In considering whether the decision on "waste" was arbitrary and capricious, the equal access to the marital community funds is relevant. During the marriage, both Patti Manus had access to the ATM card for their joint bank account, and all the while she kept her earnings separate from Ed Manus. The monies withdrawn from the ATMs in casinos were from their joint bank account, which was funded exclusively by the wages of Ed Manus.

Funds from Patti Manus' separate bank account were never used for their joint entertainment or for any activities in casinos or for Ed Manus' gambling. It is telling that after separation, Ed Manus took Patti Manus off the joint account. In the following year, the ATM withdrawals substantially reduced, when Patti Manus no longer had access to the bank account.

Mr. Manus denied that he was gambling to the extent inferred by Patti Manus' Counsel. He indicated, and she did not dispute, that cash from the ATM withdrawals were used for many other community expenses besides the entertainment of gambling. RP 74, 113-117, 122-23. In six years of marriage, the trial court attributed \$25,000 in gambling expenses to Ed Manus. That finding was based upon the ATM withdrawals for all sources, including banks and non-Casino businesses. Nevertheless, if the ATM withdrawals were all gambling, it averaged \$300 per month. In the marriage, Ed Manus earned between \$5,000 and \$5,833 per month. RP 21:18, 85:12-14; CP 23. Mr. Manus earned more than his wife. According to both Patti Manus and Ed Manus, he paid more of the

community expenses than his wife during the marriage. The undisputed record was that Ed Manus made his earnings equally available to Patti Manus, wherein she avoiding making her earnings available to Ed Manus. *In re Marriage of Steadman*, 63 Wn.App. 523, 528, 821 P.2d 59 (1991) observed of claims of "waste" and RCW 26.09.080:

. . .[W]e find that the "marital misconduct" which a court may not consider under RCW 26.09.080 refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence, the squandering of marital assets or, as here, the deliberate and unnecessary incurring of tax liabilities. In shaping a fair and equitable apportionment of the parties' liabilities the trial court was entitled to consider whose "negatively productive conduct" resulted in the tax liabilities at issue. *Clark*, at 809, 538 P.2d 145.

The *Steadman* dispute was where a spouse incurred tax penalties for the chronic failure to pay taxes. The question is whether an average monthly expenditure of \$300 per month for Ed Manus' entertainment was proof of a "negatively productive conduct" by Ed Manus. The Appellant submits the record is devoid of any proof of "negatively productive conduct" by Ed

Manus. There was lack of proof that any residence was not purchased due to the gambling. There was no proof that any bills were unpaid due to the gambling. There was no proof that there were any community liabilities whatsoever due to the gambling. The comments of the trial court and the finding of waste were directed to casting moral judgment upon Ed Manus rather than a fair and equitable distribution of the property. The trial court abused its discretion when the finding of "waste" was made without regard to the totality of marital community's ample income and that neither was wanting for the basics of life.

**E. The Trial Court Failed to Consider All of the Community Property.**

The Chrysler Concorde was purchased during the marriage and that after the separation Ed Manus continued to make the payments on the loan. Nevertheless, the trial court neither considered nor allocated this community property. The result is Ed Manus never received credit for the payments he made during the separation nor his one-half interests in this community vehicle.

This one is not the only error as to vehicles associated with Patti Manus. The testimony was that Patti Manus gave away the Dodge Neon, which was worth \$600, after the Chrysler Concorde was purchased. Yet, the trial court allocated a separate property that was not before it to Patti Manus. Both these decisions were contrary to the law of RCW 26.09.080, and basic case law, hence an abuse of discretion. *Kaseburg*, 126 Wn. App. at 561.

The uncontested testimony, and a prior judicial decision, gave the former wife Laurie Marshall, a portion of Ed Manus' retirement. The agreed testimony is that Ed Manus contributed \$25,500 of his retirement to the marital community with Patti Manus. The unchallenged testimony is that Ed Manus contribution to his retirement pension during this marriage was only \$4,676. The uncontested exhibits from the investment company for the retirement fund manager, and uncontested testimony was that any other appreciations in Ed Manus' retirement pension were due to the accumulation of income within the established pension. The find that "the community property interest in the [Ed Manus']

retirement/deferred income assets was \$45,000 as of the date of separation" (CP 112:4-5) is an untenable finding.

On the other hand, despite the exhibits and fact of testimony from Patti Manus that contribution to her retirement during marriage was \$13,500, that community asset was neither valued nor distributed. RP 45. The record was that Patti Manus unexplainably disposed of the largest community asset, the residence on seven acres, without the knowledge of Ed Manus. More disturbing: real property, wherein Ed Manus was a title holder, was transferred without his signature. The net profit from that sale was more than \$49,000. The agreed testimony was that from the date of separation until the sale, Ed Manus paid all the mortgage payments, which was an \$8,100 benefit to Patti Manus. Ed Manus received no credit for that contribution to this major community asset. Clearly, Ed Manus had a \$32,600 interest if not more, in those sales proceeds.

Here, the trial court overlooked or ignored Patti Manus obvious "concealment", albeit timely discovered, of the sale of the residence. The trial court knew it had authority to consider the

concealment of disposal of community property. No finding, comment or otherwise was made in dividing this major community asset other than to engage in speculation as to Ed Manus' patronization of casinos and the degree of his gambling. The net result of the speculation was to award the entire profit from the sale of the residence to Patti Manus.

Similarly, gambling in Washington is legal. Patronizing casinos is legal in Washington. The gambling was not concealed from Patti Manus. It is simply untenable to hold that Ed Manus' gambling constituted waste. Likewise, the view that a husband's, but not the wife's patronizing casinos, and gambling is waste, is untenable and therefore should be reversed. Making what are gratuitous comments about Ed Manus' money management, and serial marriages, while ignoring circumstances involving Patti Manus and the sale of real property titled in Ed Manus name, was neither right nor equitable, and lacked sound judicial judgment. The decisions attendant to this collection of community asset and credits due Ed Manus for protecting the assets during the

separation were a manifest abuse of discretion. *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959).

#### **F. Awarding Attorneys' Fees to Wife Error**

Patti Manus did not establish the requests for awarding attorney's fees. There are neither findings as to Patti Manus needs for fees nor Ed Manus ability to pay the attorneys' fee. Without those findings the award of the \$5,000 in attorneys fees was arbitrary and capricious, and therefore must be reversed. *In re Marriage of Steadman*, 63 Wn. App. 523, 528, 821 P.2d 59 (1991).

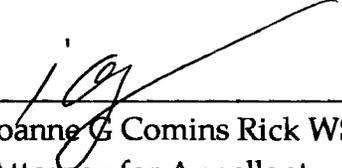
### **VIII. CONCLUSION**

Ed Manus did not engage in either marital misconduct or waste. The trial court's decisions as to property division were clearly an manifest abuse of discretion. The property division was not consistent with the statutory mandates and the established case law. The decisions on this record must be reversed and Ed Manus appropriately awarded in one-half interest in the net sales proceeds of the sale of the residence, along with credit for his contributions during the separation. He should not be required to pay

maintenance to Patti Manus. Appropriate adjustments should be made to the \$18,176 (\$13,500 Patti Manus fund plus \$4676 Ed Manus fund) made in community contributions to the retirement funds should be made. The order to pay Patti Manus attorney's fees should be reversed and the judgment vacated.

Respectfully Submitted this 2 day of September 2011.

Halstead & Comins Rick P.S.



---

Joanne G Comins Rick WSBA #11589  
Attorney for Appellant

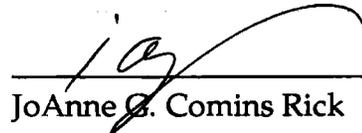
**CERTIFICATE OF SERVICE**

I hereby certify that on the 2 day September, 2011, I caused a true and correct copy of the Appellant's Opening Brief to be served in the manner indicated below.

Rickey C. Kimbrough  
P O Box 518  
Grandview WA 98930

U.S. Mail  
 Overnight Mail  
 Hand Delivery  
 And Supplemental Fax  
(509) 623-1234

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 2 day of September, 2011, at Prosser Washington.

  
\_\_\_\_\_  
JoAnne G. Comins Rick

## APPENDIX A

### **RCW§ 26.09.080. Disposition of property and liabilities - Factors**

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

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

History. 2008 c 6 § 1011; 1989 c 375 § 5; 1973 1st ex.s. c 157 § 8.

Note: Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901

### **RCW § 26.09.090. Maintenance orders for either spouse or either domestic partner - Factors**

- (1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either

domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage or domestic partnership;
- (d) The duration of the marriage or domestic partnership;
- (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

History. 2008 c 6 § 1012; 1989 c 375 § 6; 1973 1st ex.s. c 157 § 9.

Note: Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901.