

FILED

OCT 03 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:

EDWARD LEE MANUS,

Appellant,

v.

PATTI ANN MANUS,

Respondent.

BRIEF OF RESPONDENT

**RICKEY C. KIMBROUGH, WSBA #5230
P.O. Box 518
Grandview, WA 98930
(509) 882-5901
Attorney for Respondent,
Patti Ann Manus**

FILED

OCT 03 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: **EDWARD LEE MANUS,**

Appellant,

v.

PATTI ANN MANUS,

Respondent.

BRIEF OF RESPONDENT

**RICKEY C. KIMBROUGH, WSBA #5230
P.O. Box 518
Grandview, WA 98930
(509) 882-5901
Attorney for Respondent,
Patti Ann Manus**

Table of Contents

	Page
Table of Authorities.	iii
I. Introduction.	1
II. Response to Assignment of Errors.	3
Issues Presented for Review.	6
III. Statement of Case.	7
IV. Argument.	8
A. Spousal Maintenance.	8
(a) Financial Resources of the Party Seeking Maintenance.	16
(b) Standard of Living Established During Marriage.	17
(c) Duration of the Marriage.	18
(d) The Age, Physical and Emotional Condition, and the Financial Obligations of the Spouse Seeking Maintenance.	18
(e) The Financial Ability of the Spouse From Whom Maintenance is Sought.	18
B. Property Division.	20

C. Attorney's Fees.	23
V. Conclusion.	26

TABLE OF AUTHORITIES

<u>Case Law:</u>	Page(s)
<u><i>In re the Marriage of Barnett,</i></u> 53 Wn. App. 385, 388, 818 P.2d 1382 (1991). . . .	19
<u><i>In re Marriage of Brewer,</i></u> 137 Wn.2d 756, 769, 976 P.2d 102 (1999).	20
<u><i>Brewer,</i></u> <i>supra</i> at 769.	23
<u><i>In re the Marriage of Clark,</i></u> 113 Wn. App. 805, 810, (1975).	21
<u><i>Clark,</i></u> 13 Wn. App at 810.	21
<u><i>Matter of Marriage of Crosetto,</i></u> 82 Wn. App. 545, 558, 918 P.2d 954 (1996).	16
<u><i>DeRevere v. DeRevere,</i></u> 5 Wn. App. 446, 488 P.2d 763 (1971).	20
<u><i>In re the Marriage of Kaseburg,</i></u> 128 Wn. App. 546, 556, 108 P.3d 1278 (2005) . .	20
<u><i>In re Marriage of Konzen,</i></u> 103 Wn.2d 470, 478, 693 P.2d 97, cert. denied, 473 U.S. 906, 87 L. Ed2d 654, 105 S. Ct. 3530 (1985).	21
<u><i>In re Marriage of Marzetta,</i></u> 129 Wn. App 607, 624, 120 P.3d 75 (2005).	16, 19
<u><i>In re Marriage of Matthews,</i></u> 70 Wn. App. 116, 123, 853 P.2d 462 (1993).	16, 19, 22

<u>In re Marriage of Morrow,</u>	
	53 Wn. App. 570, 584, 770 P.2d 197 (1989). 19
<u>In re Marriage of Nicholson,</u>	
	17 Wn. App. 110, 117, 561 P.2d 1116 (1977). 21
<u>In re Marriage of Rink,</u>	
	18 Wn. App. 549, 554, 571 P.2d 210 (1977.).21
<u>In re Marriage of Soriano,</u>	
	31 Wn. App. 433, 643 P.2d 450 (1982). 20
<u>Stacy v. Stacy,</u>	
	68 Wn.2d 573, 576, 414 P.2d 791 (1966).17
<u>In re Marriage of Steadman,</u>	
	63 Wn. App. 523, 538, 821 P.2d 59 (1991).22
<u>In re Marriage of Stern,</u>	
	57 Wn.app. 707, 717, 789 P.2d 807. 23
	review denied, 115 Wn2d 1013, 797 P.2d 513 (1990);
<u>Suther v. Suther,</u>	
	28 Wn. App. 838, 627 P.2d 110 (1981).20
<u>In re Marriage of Tower,</u>	
	55 Wn. App. 697, 700, 780 P.2d 863 (1989). 21, 22
<u>In re Marriage of Wallace,</u>	
	11 Wn. App. 697, 708, 45 P.3 rd 1131 (2002). 22
<u>Washburn v. Washburn,</u>	
	101 Wn.2d 168, 178, 677 P.2d 152 (1984). 16
<u>Webster v. Webster,</u>	
	2 Wash. 417, 28 P. 864 (1891). 20
<u>In re the Marriage of Williams,</u>	
	84 Wn. App. 263, 927 P.2d 679 (1996). 22

In re Marriage of Zahm,

138 Wn. App. 213, 226-27, 978 P.2d 488 (1999). .16

Statutes **Page(s)**

RCW 26.09.140.	5, 23
RCW 26.09.090.	14
RCW 26.09.080.	20, 22
RCW 4.28.200.	25

Court Rules

CR 55 (c)	5, 24, 25, 26
CR 60 (b)	5, 24, 25, 26
CR 55 (c)(1)	24

I. INTRODUCTION

The parties were married September 30, 2000, following a one year relationship. No children were born of this marriage. The parties separated August 12, 2006. Each party came into the marriage with separate property, including personal property and retirement accounts. The Husband came into the marriage with substantial debt, a substantial portion of which was paid from community earnings, during the marriage.

During marriage both parties were employed, although the earnings of the Husband were consistently two to three times that of the wife. Throughout the marriage, Husband gambled regularly and extensively, and concealed the extent of his gambling from Wife. As a result, Husband dissipated in excess of \$25,000.00 of community assets.

In September 2005, the parties purchased a mobile home and approximately seven acres of land in poor condition and in need of substantial clean up. Although they intended to improve the property, little was done to the property prior to separation.

Wife commenced an action for dissolution of marriage and Husband was served with the summons and petition for dissolution

of marriage on March 17, 2007. (CP 32-33). Husband failed to appear or answer the petition and a default was ordered on June 21, 2007, at which time a default decree of dissolution of marriage was entered, awarding the real property to wife. (CP 79-81). With hired labor and volunteer efforts from friends and family, Wife cleaned up the property and sold the property on June 21, 2007. With the proceeds of this sale and Wife's separate retirement's assets, she purchased another home.

Husband, thereafter, moved to vacate the default decree entered July 18, 2007. After multiple hearings, coupled with extensive discovery, over a period of more than one year, the Court set aside the default decree, as to the property division, but not as to the award of maintenance contained in the decree entered June 21, 2007. Moreover, in settling aside the decree, the Court did not rule on the issue of attorneys fees requested by Wife, in connection with Husband and motion to vacate the Decree, reserving that issue for trial.

The matter was then tried before the Honorable Craig Matheson, on July 23, 2010. The Court found that substantial separate debts of the Husband had been paid from community earnings; that Husband had wasted approximately \$25,000.00 in

gambling; that Wife had expended substantial sums cleaning up and preparing the real property for sale. The Court, with these factors in mind, made a disposition of the party's community and separate assets, debts, and awarded Wife maintenance and attorney's fees.

Husband now appeals from the division of property, award of maintenance and award of attorney's fees.

II. RESPONSE TO ASSIGNMENT OF ERRORS

1. The trial court's ruling, awarding maintenance to Wife was within the sound discretion of the Court and is supported by ample evidence regarding the disparity of incomes of the parties as well as the extraordinary expenses incurred by Wife in cleaning up and preparing the real property for sale.
2. The Trial Court did not error in considering some \$15,000.00 of Husband's separate debt paid from community funds in fashioning a distribution of the party's community and separate assets. Although the Trial Court could not allocate the responsibility for this debt to either party, as the debt had already been paid, it was fully within its discretion, to consider this factor, in equitably dividing the community and separate assets between the parties.

3. The Trial Court's finding that the value of Husband's retirement accounts is based upon sufficient evidence and was not error.
4. The Trial Court noted and placed a value upon the Wife's retirement account with the Sunnyside Housing Authority, acquired during marriage, and in the exercise of sound judicial discretion, awarded that asset to Wife. The Trial Court's disposition of this asset was within the Trial Court's discretion, supported by the evidence, and was not error.
5. The Trial Court's findings that Husband had wasted at least \$25,000.00 in community assets through gambling was not error, and was not based upon a finding of moral impropriety, but rather was based upon established precedent regarding the wasting of community assets. Such finding was not error, but rather supported by substantial evidence, including bank account records of ATM transactions at a variety of Casinos, as well as the Husband's attempts to conceal the extent of his gambling from both the Wife and the Trial Court.

6. The Trial Court's findings that Husband wasted in excess of \$25,000.00 in gambling was supported by substantial evidence, and was not error.
7. The Trial Court's findings that Husband, unilaterally and without the knowledge of Wife, wasted and dissipated in excess of \$25,000.00 of community assets, was supported by substantial evidence, including bank account records of ATM transactions, on multiple occasions, at a variety of Casinos, as well as the Husband's attempts to conceal the extent of his gambling from both the Wife and the Trial Court.
8. The Trial Court's observation that Husband was not a very good money manager was in fact an observation rather than a finding, nevertheless amply supported by the evidence.
9. Trial Court's award to Wife of \$5,000.00 in attorney's fees was made pursuant to CR 55(c) and CR 60(b), an issue reserved for trial by the Court in vacating the default decree of dissolution of marriage entered June 21, 2007, rather than pursuant to RCW 26.09.140, was based upon the discretion of the trial court, and was not error.

10. Husband's motion for reconsideration was granted in part, resulting in the Court's reduction of the amount of spousal maintenance awarded to Wife from a total of \$12,000.00 to \$8,000.00 payable in monthly installments of \$500.00, was based upon the exercise of the Court's discretion and supported by substantial evidence, including the substantial disparity of the incomes of the parties and the extraordinary expenses incurred by wife in preparing the real property for sale as well as the paucity of assets before the court from which to create an equitable division of property between the parties, was not error.

ISSUES PRESENTED FOR REVIEW

1. Whether or not the Court abused its discretion in awarding maintenance to Petitioner?
2. Whether or not the Court abused its discretion in its distribution of the community and separate property?
3. Whether or not the Court abused its discretion in finding that the Respondent had wasted community assets through gambling, and considering that factor in its disposition of the party's community and separate assets?

4. Whether or not the Court abused its discretion in awarding
Petitioner attorney's fees, at trial?

III. STATEMENT OF THE CASE

The parties were married September 30, 2000.¹ RP (Vol II) 49:13-14; 60:17-18. They commenced their relationship one year prior to marriage. RP: (Vol II) 85: 15-17. The parties separated August 12, 2006. RP (Vol II) 5:19-020; 44: 4-6; 96: 19-20; 121: 7-8. The marriage was a first marriage for the Wife; a second marriage for Husband. RP 14:17; 44: 11-17; 50:7-12; 76:6-15; Ex 1 Tab 11. Husband had two children of his prior marriage, for whom he was ordered to pay child support in the amount of \$450.00 per month. RP (Vol II) 44:12-23.

Each of the parties were possessed of property at the time of marriage. Husband owned a 1997 pickup truck, subject to a loan upon which monthly payments of \$370.00 were made. RP (Vol II) 60:19-25. Husband was employed, by various employers as a lineman, Husband testified that he earned \$60,000.00 to \$70,000.00 per year. RP (Vol II) 21:18; 85:12—

¹ Three reports of proceeding have been filed by Husband in prosecuting this appeal. To clarify the record of the reports of proceedings, Wife designates the Report of proceedings EXCERPT OF PROCEEDINGS RULING as RP (Vol I). The transcript testimony of Patti Ann Manus and Edward L. Manus as RP (Vol II); and the transcript dated July 23, 2010, as RP (Vol III).

14; CP 23; 85: 12-16. However, an examination of Husband's deposits to the Washington Mutual Bank Account (Ex1, tab 16), shows regular monthly deposits averaging \$7,496.89.² If Husband continued earning at that rate, his extrapolated annual net income would more closely approximate \$90,000.00.

While employed, Husband made regular contributions to five different retirement deferred income or pension accounts. RP 53-59. The deferred income accounts were: (1) ICMA Pacific Corp 401K Plan; (2) ICMA Pacific Corp 457 Plan; (3) NEAP Retirement Account; and (4) HR VEBA (a health savings account). RP 53-59. Additionally, the Husband acquired benefits with PERS II while employed with the Benton County PUD. RP (Vol II) 55:8-22. The PERS II is a retirement pension plan, for which no valuation was presented. RP (Vol II) 55:17-22. The evidence presented at trial indicated that ICMA Pacific Corp 401K plan was accumulated during this marriage and had a value of \$15,862.00 at the time of separation. RP (Vol II) 53:12-21. The ICMA Pacific Corp 457 Plan, also accumulated during this marriage, was not specifically valued. RP (Vol II) 54:4-18. However, Husband did withdraw approximately

² The Washington Mutual Bank statement for the period January 18 through February 14, 2006, is missing and was not provided in discovery.

\$25,000.00 from this plan during the marriage. RP (Vol II) 19-24. The PERS II pension plan was not valued in the evidence other than by Husband's vague recollection that he thought it was worth about \$6,700.00 at the time of marriage. RP (Vol II) 56:4-6. It was further indicated that Husband's contributions to this plan had increased to \$11,991.00 by the time of separation. RP (Vol II) 56:7-12. The HR VEBA health savings plan had a balance of \$47.00. RP (Vol II) 56:19-24. The NEAP Retirement was valued at \$34,650.00 at the time of Husband's prior dissolution of marriage. RP (Vol II) 57:1-15. Husband testified that this retirement account had a value of \$50,795.00 at the time of separation from Wife. RP (Vol II) 58:12-17.

The Trial Court found that the Husband's pension appreciated about \$45,000.00 during the marriage. RP (Vol I) 3:3.

Wife came into the marriage with a 1995 Dodge Neon RP (Vol II) 11:22, furniture, washer and dryer and normal household items RP (Vol II) 12:21-24, a Nordstrom's retirement account with a value of approximately \$50,000.00 RP 6-9, a savings account with Nordstrom Bank, with a balance of approximately

\$4,000.00 RP 107:16-2-0, and an undivided one-fourth interest in an unimproved lot in Leavenworth, Washington. RP (Vol II) 10-11.

Throughout the marriage, Wife was employed as an accounting technician for the Sunnyside Housing Authority, earning a gross income of \$17.36 per hour. RP (Vol II) 5:10-17.

During the marriage, the parties acquired a Harley Davidson Motorcycle RP (Vol II) 61:12, a 2001 Chrysler automobile RP (Vol II) 62:20-25, a tractor, harrow and mower RP (Vol II) 70:10-14, and a mobile home and seven acres of real property. RP (Vol II) 69:6-21.

Throughout the marriage, the parties divided responsibility for the payment of various expenses. RP (Vol II) 14:1-22. Wife paid the rent, telephone bills and household groceries and household items. RP (Vol II) 14:7-8. Husband paid his pickup payment, the Chrysler payment, child support and the payments on his prior debts. RP (Vol II) 14:16-22. At the time of marriage Husband represented that he had a total of \$60,000.00 in pre-marital debt. RP (Vol II) 16:9-13. Husband admitted that he paid on these prior debts, through Consumer Credit Counseling,

at the rate of \$477.00 per month until April 2003, for a total of 32 months during the marriage. RP (Vol II) 75:5-19; 76:2-5.

Although, the parties used Husband's US Bank account as a joint account, and later the Washington Mutual Savings Bank Account as a joint account, Husband kept the bank statements to himself throughout the marriage. RP (Vol II) 32:10-16. Upon examining Husband's bank records, obtained through discovery, it appeared that many thousands from Husband's bank accounts had been dissipated through gambling. Ex 1 tabl 18 is a spread sheet, summarizing ATM withdrawals at gambling establishments throughout Eastern Washington and Oregon. Over \$25,000.00 was withdrawn at these locations, during the marriage by Husband. Ex 1 Tab 18.

Throughout these proceedings, Husband asserted that his only gambling expenses were to purchase an occasional lottery ticket and three trips to Las Vegas. RP 111-112. On cross examination, however, Husband admitted that he also gambled at the casino in Manson, Washington, Legends Casino in Toppenish, Washington, Jokers Casino in Richland, Washington, Kla-Mo-Ya Casino, Cactus Pete's in Jackpot, Nevada, Barton's Club in Jackpot, Nevada, Iron Horse Casino,

in Auburn, Washington, Coyote Bob's Road House and Casino, Kennewick, Washington, Cleopatra's Club Casino in Richland, Washington. RP (Vol II) 113-117. The ATM summary, Ex 1 tab 18, identifies multiple withdrawals at many of these casino's, on the same day, amounting to several hundreds of dollars. On the basis of this evidence, the Trial Court concluded that at least \$25,000.00 of community assets had been wasted by Husband's gambling, during the marriage. RP (Vol I) 3:2.

In August 2005, the parties purchased a mobile home and seven acres of real property. RP (Vol II) 17:16-19; 21:24-25; 22:102. Of the down payment of \$8,800.00, \$5,000.00 came from Husband and \$3,800.00 from Wife. RP (Vol II) 18:14-23. When purchased, the property was in need of repairs and the acreage had grown up in weeds. RP (Vol II) 22:3-22. The outbuildings were full of junk. RP (Vol II) 23: 1-7. The parties painted and carpeted the mobile home and installed toilets. RP (Vol II) 22:10-11. The acreage was never cleared. RP (Vol II) 22:17-18; 23:6-8. This property was awarded to Wife in the default decree of dissolution of marriage, entered June 21, 2007 and at that time the property was still in need of substantial clean-up. RP (Vol II) 22:23-25; 23:1-8. Wife spent most of the

summer of 2007 cleaning up the property. RP (Vol II) 23:21-23. In cleaning up the property for sale, Wife spent \$1,984.19. RP (Vol II) 24:11-12. In addition, she paid delinquent irrigation assessments of approximately \$1,000.00. RP (Vol II) 24:1-2. Additionally, Wife had help from friends and family, who brought in backhoes and dump trucks to load and haul off debris from the property. RP (Vol II) 25:3-11. Subsequently, Wife sold the property, netting \$48,446.63. RP (Vol II) 27:7-21.

Wife initiated this action for dissolution of marriage by filing a summons and petition for dissolution of marriage with the clerk of the Benton County Superior Court on March 15, 2007. Husband accepted service of the summons and complaint on March 17, 2007. (CP 32-33). Husband failed to appear or respond to the petition in any way and an order of default was entered May 24, 2007. Findings of Fact, Conclusions of Law and a Decree of Dissolution of Marriage were entered, by default, on June 21, 2007. On July 25, 2007, Husband filed a motion to vacate the decree entered June 21, 2007. Between July 25, 2007 and April 29, 2009, the parties appeared for multiple hearings and engaged in discovery. On April 29, 2009,

the Court granted Husband's motion to vacate the decree of dissolution of marriage, in part. CP 067A; CP 080.

IV. ARGUMENT

A. Spousal Maintenance. The Trial Court's award of maintenance to wife, in the amount of \$8,000.00, payable in monthly increments of \$500.00, was not error where Husband's income was more than two to three times that of the Wife, wife had incurred substantial costs in preparing the real property for sale, and there were otherwise insufficient assets to render an equitable division of the parties community property.

RCW 26.09.090 provides, in pertinent part:

- (1) In a proceeding for dissolution of marriage . . . the court may grant a maintenance order for either spouse
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, .

(c) The standard of living established during the marriage .

(d) The duration of the marriage :

(e) The age, physical and emotional condition, and the financial obligations of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse.

In this marriage of six years duration, Wife was employed as an accounting technician, earning less than half of what Husband earned, RP (Vol II) 5:10-17; 21:18; 85:12-14; CP 23, and at the time of separation, earning approximately one-third of what Husband earned. (Ex 1, tab 16). In 2005 the parties had acquired a residence and seven acres of land. RP (Vol II) 21:24-25; 22:1-2. The seven acres of land remained unworked and unproductive throughout the marriage. RP (Vol II) 22:21-25; RP 23:1-8. The Wife incurred \$1,984.19 in expense in cleaning up the property for sale RP (Vol II) 24:11-12 and approximately \$1,000.00 in delinquent irrigation expenses in order to sell the

property. Finally, Trial Court noted, that there were insufficient community assets from which to make an equitable division of the parties community property. RP (Vol I) 4:14-17.

The only limitation on an award of maintenance is that the amount and duration of the maintenance ordered be just, considering all relevant factors. Washburn v. Washburn, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). In awarding maintenance, the trial court exercises broad discretionary powers, which will not be overturned on appeal absent a showing of manifest abuse of discretion. *Id* at 179; In re Marriage of Zahm, 138 Wn. App. 213, 226-27, 978 P.2d 488 (1999); In re Marriage of Marzetta, 129 Wn. App 607, 624, 120 P.3d 75 (2005). A manifest abuse of discretion occurs only when the trial court fails to consider the statutory factors. Matter of Marriage of Crosetto, 82 Wn. App. 545, 558, 918 P.2d 954 (1996); In re Marriage of Matthews, 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

(a) Financial Resources of the Party Seeking Maintenance. In this case, the Trial Court considered the financial resources of Wife, who worked as an accounting technician, earning a gross wage of \$17.36 per hour. RP (Vol II) 5:10-17. On the other hand, Husband was customarily earning \$60,000.00 to

\$70,000.00 a year. RP (Vol II) 21:18; 85:12—14; CP 23. The evidence also showed that during the four to five months prior to separation, Husband's net monthly income was on average \$7,496.89. Ex1, tab 16. The difference or disparity in earning capacity between the parties is an important factor to be considered, not only in regards to property distribution, but also as to maintenance. See Stacy v. Stacy, 68 Wn.2d 573, 576, 414 P.2d 791 (1966). In this case, the record contains substantial evidence as to the disparity of incomes of the Husband and Wife, and was clearly considered by the Trial Court in awarding maintenance. RP 5.

(b) Standard of Living Established During Marriage.

During this marriage, the party's standard of living, included the purchase of a home. RP (Vol II) 17-19. Consequently, Wife used the proceeds from the sale of the real property, together with the entirety of her separate savings and retirement assets from Nordstrom, to acquire another home thereby at least maintaining that aspect of the standard of living established during the marriage. RP (Vol II) 27-28.

Moreover, the Trial Court found that there had been a significant wasting of community assets by Husband, during the marriage. RP (Vol I) 2:4-10; 3:1-2.

(c) Duration of the Marriage. The Trial court had in mind the duration of the marriage. RP (Vol I) 2:4-6, in its ruling, the Trial Court noted that this was a marriage of six years in duration, and that during the marriage, the parties earned a good income. This factor was clearly considered by the Trial Court

(d) The Age, Physical and Emotional Condition, and the Financial Obligations of the Spouse Seeking Maintenance. In this case the Wife was 46 years of age at the time of trial. RP (Vol II) 5:8. Husband was 39 years of age at the time of trial. RP (Vol II) 50:4. Neither party presented evidence as to any physical or emotional problems or conditions. Based upon the evidence presented, the Trial Court noted that Husband was a good income earner. RP (Vol I) 5:5. The only evidence of post dissolution of marriage debt were as to the Wife's home loan, requiring monthly payments of \$402.00 per month RP (Vol II) 28:24-25, and Husband's pickup payment and Harley Davidson Motorcycle payment. RP (Vol II) 61:10-25; 62:1-4; 62:8-18. Given the wide

disparity of incomes between the parties, this was certainly an important factor in the Trial Court's determination to grant maintenance.

Additionally, the Court had in mind the equitable division of property, in consideration of Husband's waste and dissipation of community assets, and the absence of additional assets that could be awarded to Wife to create a fair and equitable distribution of property and liabilities. RP (Vol I) 4:14-15. Consideration of the division of property and the wasting of community assets by a spouse are appropriate factor for the court to consider in deciding a maintenance issue. In re the Marriage of Marzetta, 129 Wn. App. 607, 625, 120 P.3d 75 (2005); In re the Marriage of Matthews, 70 Wn. App 116, 124, 853 P.2d 462 (1993); In re the Marriage of Barnett, 53 Wn. App. 385, 388, 818 P.2d 1382 (1991); In re Marriage of Morrow, 53 Wn. App. 570, 584, 770 P.2d 197 (1989).

(e) The Financial Ability of the Spouse from whom Maintenance is Sought. Again, the financial condition of both spouses is set out in the evidence. The party's respective earning capacity is well established, and it is clear that at the time of trial, Husband was earning approximately three times the earnings of Wife. Ex 1, Tab 16. Wife has used virtually all of her assets to

acquire a place to live. RP 28:6-12 . Husband, on the other hand, has a well established record of strong income.

B. Property Division

RCW 26.09.080 provides, in pertinent part:

In a proceeding for dissolution of marriage . . . , the court shall, without regard to misconduct, make such disposition of the property and 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 . . . at the time the Division of property is to become effective,

The trial court has the duty to make a final disposition of all of the property of the parties brought to its attention. DeRevere v. DeRevere, 5 Wn. App. 446, 488 P.2d 763 (1971); In re Marriage of Soriano, 31 Wn. App. 433, 643 P.2d 450 (1982). All of the property of the parties, community and separate, is before the court for disposition. Webster v. Webster, 2 Wash. 417, 28 P. 864 (1891); Suther v. Suther, 28 Wn. App. 838, 627 P.2d 110 (1981). A trial court has broad discretion under RCW 26.09.080 to evaluate and distribute the parties' property and liabilities. In re the Marriage of Kaseburg, 128 Wn. App. 546, 556, 108 P.3d 1278 (2005); In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). A

manifest abuse of discretion standard is applied upon review of a trial court's decision *Id* at 556. A trial court manifestly abuses its discretion when it makes an untenable or unreasonable decision. In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989).

A property distribution need not be equal to be "just and equitable". In re Marriage of Nicholson, 17 Wn. App. 110, 117, 561 P.2d 1116 (1977). *"The key to an equitable distribution of property is not mathematical preciseness, but fairness."* In re the Marriage of Clark, 113 Wn. App. 805, 810, (1975). *Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.* Clark, 13 Wn. App at 810.

The trial court's considerable discretion in making a property Division will not be distributed on appeal absent a manifest abuse of that discretion. E.g., In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97, cert. denied, 473 U.S. 906, 87 L. Ed2d 654, 105 S. Ct. 3530 (1985). *A manifest abuse of discretion is a decision manifestly unreasonable or exercising untenable grounds or for untenable reasons. It is one that no reasonable person would have made. See, e.g. In re Marriage of Rink*, 18 Wn. App. 549, 554, 571 P.2d 210 (1977.)

In re Marriage of Tower, at 700.

It is well established in Washington law that a trial court may consider, in distributing the property of the parties, the wasting or squandering of marital assets. See In re Marriage of Wallace, 11 Wn. App. 697, 708, 45 P.3rd 1131 (2002); In re the Marriage of Williams, 84 Wn. App. 263, 927 P.2d 679 (1996); In re Marriage of Matthews, 70 Wn. App. 116, 124, 853 P.2d 462 (1993); In re Marriage of Steadman, 63 Wn. App. 523, 538, 821 P.2d 59 (1991).

In a dissolution proceeding, “the court shall, without regard to marital misconduct, make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable[.]” RCW 26.09.080,

however, Randy mistakenly argues that this directive bars a trial court from considering all types of misconduct in making its property distribution. RCW 26.09.080, however “refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence [or] the squandering of marital assets[.]” In re the Marriage of Steadman,

63 Wash. App. 523, 528, 821 P2d 59 (1991.)

In this case, the trial court considered evidence as to each of the statutory factors, as well as the Husband’s waste and

dissipation of community assets by gambling; a factor which Husband sought to conceal from both Wife and the court, at trial. RP 1:112-117. The Court noted specifically that the marital property was minimal considering the combined incomes of the parties, noting the duration of the marriage. RP 2:1-12. Moreover, the court clearly had in mind the economic circumstances each spouse would be in at the time of division of the property, and considered the party's respective ages, health, education and Husband's superior earning abilities. RP (Vol I) 2:3-10; 5:5-24.. Where the Court based its distribution of property upon the substantial evidence presented and a consideration of the statutory factors, its discretion should not be disturbed on appeal absent a showing of manifest abuse of discretion. See In re Marriage of Stern, 57 Wn.app. 707, 717, 789 P.2d 807, *review denied*, 115 Wn2d 1013, 797 P.2d 513 (1990); Brewer, *supra* at 769. The trial court is in the best position to assess the assets and liabilities of the parties and determine what is fair and equitable under all circumstances. *Id* at 769.

C. Attorney's Fees. Attorney's fees were not requested in Wife's petition for dissolution of marriage, under RCW 26.09.140.

However, in response to Husband's motion to vacate the default decree of dissolution of marriage, entered June 21, 2007, Wife sought an award of attorney's fees pursuant to CR 55(c) and CR 60(b). CR 55(c)(1) provides:

Generally. For good cause shown **and upon such terms as the court deems just**, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b). (Emphasis added) CR 60(b) provides, in pertinent part, that:

(b) Mistakes; inadvertence; Excusable Neglect;

Newly Discovered Evidence; Fraud; etc. On

motion **and upon such term as are just**, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (Emphasis added)

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;*
- (2) For erroneous proceedings against a minor or person or unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;*

- (3) *Newly discovered evidence with by due diligence could not have been discovered in time to move for a new trial under rule 59(b);*
- (4) *Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;*
- (5) *The judgment is void;*
- (6) *The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;*
- (7) *If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;*
- (8) *Death of one of the parties before the judgment in the action;*
- (9) *Unavoidable casualty or misfortune preventing the party from prosecuting or defending;*
- (10) *Error in judgment shown by a minor, within 12 months after arriving at full age; or*
- (11) *Any other reason justifying relief from the operation of the judgment.*

Under both CR 55(c) and 60(b), relief from a default and default judgment may be granted upon “such terms as the court deems just,” and “such terms as are just.” In response to Husband’s motion to set aside the default decree, Wife sought an award of attorneys fees as terms. The hearings and related discovery, ordered by the Court Commissioner, in considering Husband’s application for relief from the default decree, involved multiple hearings, over a period in

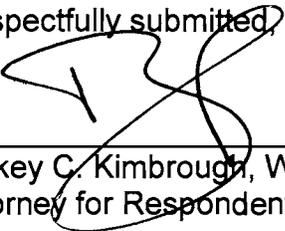
excess of 12 months. Substantial attorney's fees were incurred in the process, for which Wife sought an award of terms. In granting the Husband's motion to vacate the default decree of dissolution of marriage as the distribution of assets and debts, Commissioner Schneider did not rule on the Wife's application for terms under CR 55 (c) and CR 60(b). That motion was renewed at trial, resulting in the trial court's award of \$5,000.00 in attorney's fees to Wife.. RP (Vol I) 4:20-21. That decision by the trial court was addressed again, upon Husband's motion for reconsideration. RP (Vol III) 22:9-22. Upon reconsideration, the court again, expressing that it had considered Wife's application for some \$17,000.00 in attorney's fees, reaffirmed its award of \$5,000.00 in attorney's fees to Wife. RP (Vol. III) 22: 19-V.

V. CONCLUSION

Based upon the evidence the evidence presented at trial, the laws and decisions of the State of Washington cited, and the exercise of judicial discretion by the trial court, the Wife respectfully requests that the Findings of Fact,

Conclusions of Law and the Decree of Dissolution of
Marriage entered July 23, 2010, be affirmed.

Respectfully submitted,



Rickey C. Kimbrough, WSBA No. 5230,
Attorney for Respondent

**COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON**

In re the Marriage of:)	Court of Appeals 29241-III
)	
PATTI ANN MANUS,)	
Petitioner,)	CERTIFICATE OF MAILING
)	
and)	
)	
EDWARD LEE MANUS,)	
Respondent.)	

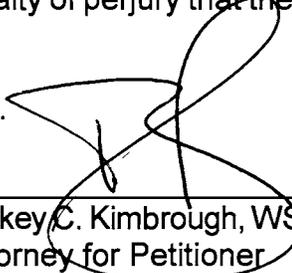
The undersigned, being first duly sworn on oath deposes and states:

On the 30th day of September, 2011, I caused to be forwarded a copy of the attached *Brief of Respondent* addressed to the following:

JOANNE COMINS RICK	[]	U.S. Mail
Halstead & Comins Rick, P.S.	[x]	Hand Delivery
PO Box 511	[]	Federal Express
Prosser, WA 99350	[]	Facsimile

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

DATED: September 29, 2011.



Rickey C. Kimbrough, WSBA #5230
Attorney for Petitioner
607 E. Wine Country Road
P. O. Box 518
Grandview, WA 98930