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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30662-3-III

In re the Marriage Of:

LIUBOV A. SCHMIDT, Appellant

and

KENNETH R. SCHMIDT, Respondent.

APPELLANT'S BRIEF

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I. INTRODUCTION

Liubov Schmidt immigrated from Russia to marry Kenneth Schmidt. She gave up a lucrative career as a travel agent and sold her home and all of her belongings to move to a country where she did not speak the language and had limited employment prospects.

At the time of the marriage, Kenneth Schmidt made his living as a private lender. He owned substantial property including life insurance policies and individual retirement accounts totaling about \$76,968.34, a house worth about \$200,000.00, as well as about \$889,060.00 invested in private loans that generated interest income at about five or six percent. The loans generated about \$6,965.68 in monthly income. No prenuptial agreement was executed.

The marriage was not successful. Liubov Schmidt testified that Mr. Schmidt attempted to isolate and control her, those efforts eventually escalating to physical abuse. Initially, he did not allow her to work outside the home and gave her an allowance of \$100.00 per month to buy food, clothing, and other necessities. Eventually, she was able to generate a small income as a private music teacher and other part-time jobs, playing violin in the Walla Walla Symphony and serving as the Symphony

librarian. Her highest income level during the marriage was \$15,794.00 for one year.

The stresses of the oppressive marriage began to wear on Mrs. Schmidt's health. She began to suffer debilitating headaches and pain in her neck and shoulders and was ultimately diagnosed with fibromyalgia. Her teeth were also severely infected, causing her pain and requiring extensive treatment. As her health deteriorated, her employment became more sporadic.

During the marriage, Mr. Schmidt substantially commingled community and separate resources. He maintained a number of bank accounts into which he received income from Social Security, pension income, as well as payments on his outstanding loans. He used the funds in the accounts to pay for regular household expenses as well as business expenses and to obtain new loans. There was no segregation of business accounts from personal funds. Apart from the \$100.00 per month allowance he gave to Mrs. Schmidt, no portion of the income generated from his lending business was allocated to the marital community.

Mr. Schmidt also sold the house he had owned at the time of the marriage and built a new home with Mrs. Schmidt. Mr. Schmidt took title to the new house as his separate property, obtaining a quit claim deed from

Mrs. Schmidt as to any interest in the property. Mrs. Schmidt, having recently transferred her own home in Russia, later testified that she did not understand what she was asked to sign and believed that the home was to be owned jointly.

After nearly five years in the tumultuous marriage, Mrs. Schmidt petitioned for dissolution. The property division and Mrs. Schmidt's request for maintenance proceeded to trial. At trial, Mrs. Schmidt submitted evidence showing that Mr. Schmidt managed his lending enterprise as an active business operation, claiming considerable expenses and mileage on his tax returns as business expenses (rather than passive investment expenses), monitoring the outstanding loans and payments received, corresponding with his attorney and the broker who sold him loans, and otherwise contributing substantial time and energy toward the enterprise. Mrs. Schmidt argued that under *Pollock v. Pollock*, 7 Wn. App. 394, 499 P.2d 231 (1972) and *Marriage of Lindemann*, 92 Wn. App. 64, 960 P.2d 966 (1998), the marital community was entitled to the value of Mr. Schmidt's labor in increasing the value of his lending enterprise by \$223,694.86 in capital invested. Mr. Schmidt claimed that he spent only a nominal amount of time managing the loans and argued that the entire lending enterprise, valued at about \$1,112,754.86 in invested capital at the time of the dissolution, was his separate property.

The trial court found that the marital home, the loans, and various items of personal property were Mr. Schmidt's separate property. In its findings of fact and conclusions of law, it expressly declined to follow *Pollock v. Pollock* in characterizing the lending enterprise, or any portion of it, as a community asset. It found that Mrs. Schmidt's separate property consisted of her jewelry, personal effects, and some items she had brought with her from Russia. And it found that the only community property consisted of some items of furniture and furnishings and motor vehicles. Contradicting these findings, the trial court awarded Mrs. Schmidt \$25,000.00 as her share of the community property, failing to state how it reached this finding. Mr. Schmidt received all of the bank and retirement accounts, loans, and the marital home. The trial court's distribution resulted in an award of assets worth approximately \$1,701,039.13 to Mr. Schmidt and \$25,000.00 cash to Mrs. Schmidt.

The trial court further found that Mr. Schmidt had the ability to pay maintenance and ordered him to pay \$2,000.00 per month for 24 months. It rejected her request for rehabilitative maintenance, finding that she had sufficient skills and experience such that additional education or training was unnecessary. It did not provide any assistance to her to complete her extensive dental work or to pay for her ongoing medical treatment. Its maintenance award left Mr. Schmidt with monthly income

of \$9,317.06 to \$11,417.06, which vastly exceeded his estimated monthly expenses of \$2,370.00.

Mrs. Schmidt contends on appeal that the trial court erred in refusing to apply *Pollock v. Pollock* and *Marriage of Lindemann* in evaluating whether Mr. Schmidt's lending enterprise was characterized as community property or separate property. She further contends that the trial court abused its discretion when its award of property and maintenance was vastly disparate, awarding income and property to Mr. Schmidt that exceeded his needs while failing to address her medical expenses and income generating potential.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in finding that Mr. Schmidt's lending enterprise was entirely his separate property without considering whether, under *Pollock v. Pollock*, the marital community had an interest in the enterprise as the result of Mr. Schmidt commingling his community labor with his separate capital investments.

ASSIGNMENT OF ERROR 2: The trial court's findings that Mr. Schmidt's contribution of time and energy to his lending enterprise was

insubstantial and that only “two, three, or four contracts” were generated after the marriage are unsupported by substantial evidence.

ASSIGNMENT OF ERROR 3: The trial court erred in dividing the property and income in a manner that left the parties in grossly disparate financial positions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Under *Pollock v. Pollock* and *Marriage of Lindemann*, did Mr. Schmidt commingle community assets with his separate lending enterprise such that the marital community acquired an interest in the loans purchased and managed during the marriage? YES.

ISSUE 2: In reviewing Exhibit 4, which documents Mr. Schmidt’s business activities during his marriage, is the trial court’s finding that his time expended was insubstantial and that only a few, unproductive loans were generated during the marriage contrary to the evidence? YES.

ISSUE 3: Was the trial court’s award of property and maintenance to Mrs. Schmidt erroneous in that it failed to properly characterize the community assets and separate assets and failed to make a fair and equitable division of the property and resources available to both parties? YES.

IV. STATEMENT OF THE CASE

Liubov Schmidt was born in Tajikistan, part of the former Soviet Union near Afghanistan. RP 141-42. She received her education in Tajikistan, obtaining degrees in music and in health education. RP 156-57. She married and had two children with her husband, raising them in a house they built near Lipetsk, Russia. RP 158-60. Her husband was killed and she began a sewing business to support herself and her sons. RP 162. She also worked for a family business selling sunflower oil. RP 165. Eventually, she established a travel agency business that was very successful, earning about ten times the average monthly wage in Russia. RP 169-70. Her successful business allowed her to pay for her two sons to obtain university educations. RP 170.

In about 2003, Liubov Schmidt's oldest son created an account for her on a Christian singles website to help her meet people and practice her English. RP 171-72. Kenneth Schmidt saw her profile and began to communicate with her. RP 175-76. Mr. Schmidt had been to Russia before and they shared interests in music and travel, as well as their Adventist faith. RP 176-77. They met in person in the Czech Republic in October 2004. RP 177-78. Afterward, they continued communicating regularly by telephone and their relationship developed romantically. RP 181.

As the relationship became more serious, Mr. Schmidt met Liubov Schmidt's relatives in the U.S. and discussed with them his desire to marry her. RP 182. He traveled to Russia in 2004 to meet her parents and her pastor, and asked her to marry him. RP 183, 188.

Liubov Schmidt left Russia for the U.S. in September 2005 and married Kenneth Schmidt five days later. RP 210-11. They did not execute a prenuptial agreement. RP 251. At first, she did not sell her house in Russia and instead had her brother take care of it. RP 209-10. She did sell her travel agency business and gave the money to her husband. RP 225-26.

At first, the marriage was happy; but problems began to surface after her son Rostik came back to live with them. RP 212. Mr. Schmidt began to impose strict rules, limiting showers to two minutes and keeping doors open at all times. RP 213. He prohibited them from speaking Russian in the house, including during phone calls to her parents and family, even though her English language proficiency was limited. RP 214-15. He checked all of her emails and kept the passwords to her accounts. RP 218. He monitored her comings and goings from the house and forbid her from visiting her son. RP 242. On one occasion, when she visited her son without Mr. Schmidt's permission, he confronted her there

and told her to leave. RP 289. Mrs. Schmidt also learned after the marriage that her husband was unable to transfer his membership in the church because of a prior incident of sexual misconduct involving a minor girl. RP 291; Exhibit 3, Tab 9. This revelation shocked and worried Mrs. Schmidt because of the children she taught violin being exposed to Mr. Schmidt. RP 294-95. She became concerned about whether she should tell the children's parents, and ensuring she always supervised the children in her home. RP 296.

Although Mrs. Schmidt wished to work outside the home, her limited English proficiency as well as Mr. Schmidt's expectation that she would be a housekeeper limited her employment opportunities. RP 226-27. Despite his abundant resources, Mr. Schmidt provided Mrs. Schmidt with a monthly allowance of just \$100.00. RP 232. Eventually, Mrs. Schmidt was able to earn small amounts teaching violin to Russian students and playing in the Walla Walla Symphony. RP 229-31. She used the money she earned to help pay for her son's education. RP 234. Mr. Schmidt spent his days in his home office, working on his business and discussing his business activities by phone and email. RP 237-38.

As the stresses of the marriage mounted, Mrs. Schmidt began to experience difficulty sleeping. RP 241. She suffered from migraine

headaches that made it difficult to play her violin as well as stomach pain and joint pain. RP 252-54. Her physicians identified the cause of her pain as the stressful environment in which she was living. RP 253; 351. She was ultimately diagnosed with fibromyalgia depression, and her doctor prescribed some medication as well as water aerobics, counseling and massage therapy. RP 254-56; 355. Her doctor believed that her condition precluded her from substantial gainful employment. RP 377.

Mrs. Schmidt also suffered greatly from dental problems. In 2007 she started to have pain and swelling in her cheek and was given a root canal. RP 327. She had several additional root canals and implants, and continued to experience pain and difficulty eating because she could not pay to complete the treatment. RP 328-29, 331. Her dentist testified that she presented with an abscess in a lower tooth and recommended implants upon which a bridge could be placed. RP 341. Dr. Schroeder identified approximately \$11,850.00 in additional dental work that Mrs. Schmidt was likely to require and acknowledged that she had been unable to pay \$1,853.00 for work already performed. RP 342-43; 345.

In an attempt to improve their marriage, the Schmidts bought a new property and built a house on it together. RP 245-46. Mrs. Schmidt understood that her name would be on the title to the house, which she felt

would give her some security. RP 246. Mr. Schmidt drove her to the title company to sign the closing papers, showing her where to sign. RP 249-50. She did not realize that the documents she signed relinquished any interest she had in the property in favor of Mr. Schmidt. RP 250.

After the new home was purchased, and believing she had an interest in it, Mrs. Schmidt decided to donate her house in Russia to the church. RP 256. She returned to Russia to complete the transfer, and Mr. Schmidt sent her the documents she needed to donate the house and claim it as a deduction on their tax return. RP 257-58; 638.

After donating her house, Mrs. Schmidt found some papers that she did not understand and asked her friend to translate them for her. Her friend explained that the papers were part of a plan for divorce. Mrs. Schmidt was surprised because she thought the marriage was improving. RP 244-45. Later, Mr. Schmidt wrote her a letter suggesting that they divorce. RP 290.

Eventually, the dysfunction in the marriage escalated to physical violence. Mrs. Schmidt described incidents when Mr. Schmidt grabbed her arm and threw her outside in the snow. RP 297-98. Mr. Schmidt began to leave the house for extended periods, telling her it was for business. RP 298. He began to communicate with other women online in

intimate ways. RP 299-300. Eventually, Mr. Schmidt began to talk about going to Bi-Mart to buy a gun and keep it under his pillow. RP 321. Mrs. Schmidt felt threatened by this discussion and discussed it with her pastor, who told her to protect herself. RP 321, 326. She then took the step of petitioning for dissolution. RP 326-27; CP 1.

Mrs. Schmidt testified at trial about her earning history and the training required to make her employment more profitable. One option included training in teaching the Suzuki method, which Mrs. Schmidt was initially unable to attend due to her illness. RP 336. Another option included a master's program in health education that would cost around \$30,000.00. RP 338.

At trial, Mr. Schmidt claimed that his lending enterprise was a passive investment and claimed that he spent very little time on it. RP 491; 558; 614. However, Mrs. Schmidt proffered testimony from an expert in tax preparation, Riett Jacks, who testified that Mr. Schmidt identified his occupation on his tax returns as "investor" and declared business expenses on Schedule C, rather than passive investment expenses which would be reported as miscellaneous itemized deductions on Schedule A. RP 304-06. She also considered the extensive mileage deducted that reflected between possibly 220 to 440 hours of business

travel in concluding the enterprise would likely be considered an active business rather than a passive investment by the IRS. RP 307-08. Exhibit 4, which was admitted in full, further demonstrated the extensive work and time that Mr. Schmidt invested in his lending enterprise.

Mr. Schmidt admitted that the interest income generated from the loans during the marriage was \$183,733.72, less five percent for expenses. RP 564. He also acknowledged that he used a single account for both business and personal items. RP 621-25; 626. He reinvested funds earned into new loans, including increasing loans that he had made prior to the marriage. RP 625; 635. He made a number of large deposits and withdrawals from various accounts that he could not explain. RP 620; 626; 630; 631-32; 634; 636.

Following trial, the trial court entered findings of fact and conclusions of law in which it found that the private loans were Mr. Schmidt's separate property based upon its finding that his time spent was insubstantial, and that three or four loans were generated during the marriage *could* be considered community property, but had no value. CP 91. Accordingly, the trial court awarded Mr. Schmidt the marital home, the private loans, the bank and investment accounts, and some items of personal property. CP 98. Mrs. Schmidt received some furniture and a

cash award of \$25,000.00, the basis for which was not clearly explained. CP 98. Mrs. Schmidt was also apportioned the liabilities she incurred after the separation, including her outstanding medical bills. CP 99. For maintenance, the trial court found that Mrs. Schmidt would be able to return to teaching music lessons and provide d for no additional education or training. CP 93. It awarded maintenance of \$2,000.00 per month for 24 months. CP 99.

Mrs. Schmidt timely appeals. CP 101.

V. ARGUMENT

Mrs. Schmidt contends that the trial court erred in failing to acknowledge the interest of the marital community in Mr. Schmidt's private lending enterprise. Because the value of the enterprise grew considerably during the nearly five-year marriage as the result of Mr. Schmidt's considerable efforts in acquiring and managing a number of private loans, and because Mr. Schmidt did not provide any compensation to the marital community for his investment of time and resources into growing the business, the marital community acquired an interest in the lending enterprise representing the commingled labor of Mr. Schmidt. Mrs. Schmidt further contends that the trial court's property division and

maintenance award was grossly disparate and failed to adequately consider the needs and resources of both parties. Accordingly, the decree of dissolution should be reversed and the case remanded to enter a new property division that accurately characterizes the property and justly and equitably provides for the needs of both parties.

- I. By failing to compensate the community for the value of labor contributed during the marriage to grow his private lending enterprise, Mr. Schmidt commingled community and separate assets such that the marital community acquired an interest in the private lending enterprise.

In a dissolution proceeding, all of the assets and liabilities of the parties, both community and separate, are to be divided by the court. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). The trial court's duty is to make a just and equitable division of all property, considering:

- (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.

RCW 26.09.080.

In applying the statutory factors, the property must first be characterized as community or separate. *Griswold*, 112 Wn. App. at 339. The trial court's characterization of property as community or separate is a question of law reviewed de novo on appeal. *In re Marriage of Mueller*, 140 Wn.App. 498, 503–04, 167 P.3d 568 (2007).

The law favors characterization as community property unless there is no question as to its separate character. *In re Marriage of Davison*, 112 Wn. App. 251, 258, 48 P.3d 358 (2002). Property acquired during a marriage is presumed to be community property. *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 407-08, 433 P.2d 209 (1967).

A spouse asserting that property acquired during the marriage is separate has the burden to establish its status by clear and satisfactory evidence, which requires the claimant spouse to particularly trace the acquisition of the asset to his or her separate funds. *Pollock*, 7 Wn. App. at 400; *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Self-serving declarations that property is part of a separate estate are inadequate to meet this burden:

The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose. Separate funds used for such a purpose should be traced with some degree of particularity.

Pollock, 7 Wn. App. at 400.

Property acquired after the date of marriage is presumptively community property. *Connell v. Francisco*, 127 Wn.2d 339, 350, 898 P.2d 831 (1995). Moreover, under *Pollock*, 7 Wn. App. at 401, and *Marriage of Lindemann*, 92 Wn. App. 64, 72, 960 P.2d 966 (1998), the marital community is entitled to the fruits of all labor performed by either spouse, including an increase in value of a spouse's separate property that is attributable to that spouse's investment of community labor. This is because the term "acquired," as used to define separate and community property, is construed to include wages and other property acquired through the toil, talent, or other productive faculty of either spouse. *Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984).

If the trial court fails to properly categorize assets as community or separate, its property division is reversible error. *Pollock*, 7 Wn. App. at 399 (citing *Peterson v. Peterson*, 3 Wn. App. 374, 475 P.2d 576 (1970));

Fite v. Fite, 3 Wn. App. 726, 479 P.2d 560 (1970); *Blood v. Blood*, 69 Wn.2d 680, 419 P.2d 1006 (1966)).

In *Pollock*, the court of appeals observed that the Petitioner had continued to manage his separate assets after the marriage and derived substantial income from them. The rule recognized by the *Pollock* court is that the value of labor contributed by a spouse to his separate estate belongs to the marital community:

[I]f plaintiff seeks to retain the separate character of income derived from a combination of his separate business and his post-marital personal services with respect thereto, he is required to make a contemporaneous segregation of the income so derived as between the community and his separate estate. This can be accomplished by the allocation to the community of what in effect would be a reasonable salary for his services. The allocation in the nature of a salary is then considered community income, and the balance of his income remains his separate property.

Pollock, 7 Wn. App. at 401. In *Pollock*, the plaintiff failed to allocate any portion of the income derived from his services to the marital community and further maintained commingled accounts that were used for both business and personal expenses and failed to trace with particularity the deposits and expenditures allocated to his separate business interests. *Id.* at 401-02. The court of appeals accordingly concluded that the marital community had an interest in the property plaintiff claimed as his separate property. *Id.* at 402.

In *Marriage of Lindemann*, the parties cohabited as an unmarried couple after being previously married and divorced. Mr. Lindemann started an auto body repair business shortly after the divorce. The parties reconciled a few years later and cohabited for ten years before separating again. *Lindemann*, 92 Wn. App. at 68. Mr. Lindemann continued to work at the auto body repair business throughout the period of cohabitation and his labor increased the value of the business. *Id.* at 68-70. There was no contemporaneous segregation of the value of Mr. Lindemann's labor to the marital community. *Id.* at 70.

In analyzing whether Mrs. Lindemann had a claim to the increase in value to Mr. Lindemann's business, the *Lindemann* court stated:

There is a presumption that any increase in the value of separate property is likewise separate in nature. Thus, at the end of a marriage each spouse is entitled to "the increase in value during the marriage of his or her separately owned property, except to the extent to which the other spouse can show that the increase was attributable to community contributions." The spouse with the separate ownership interest may defend against the other spouse's claim of an equitable interest by showing that the increase in value is attributable not to community contributions of labor or funds, but rather to rents, issues and profits or other qualities inherent in the business. But if the court is persuaded by direct and positive evidence that the increase in value of separate property is attributable to community labor or funds, the community may be equitably entitled to reimbursement for the contributions that caused the increase in value. And in situations where income from the separate property has been commingled with income from

community labor to produce an increase in value of the property, the community claimant may invoke a presumption that unless there has been a segregation at the time the income arises, the increase in value belongs to the community.

92 Wn. App. at 69-70 (citations omitted).

Here, Mrs. Schmidt entered into evidence Exhibit 4, consisting of the correspondence, loan documentation, payment records, and other records generated by Mr. Schmidt as evidence that income from the loans and the growth of the private lending business was not simply the result of the accrued rents, issues and profits of the loans, but rather required the investment of labor and energy on Mr. Schmidt's part to maintain and grow the business. Mr. Schmidt also claimed business expenses from the lending enterprise as an active business rather than a passive investment, claiming over 11,000 miles in business travel and a deduction for business use of his home. Exhibit 5, Tab 1. Only Mr. Schmidt's self-serving testimony that he spent very little time managing the account supports a conclusion that the inherent qualities of the lending enterprise contributed to its growth. But his self-serving testimony falls short of the clear and convincing evidence required to overcome the presumption that the loan assets obtained during the marriage were community property. *Pollock*, 7 Wn. App. at 400. The finding that his contribution to the business was "insubstantial" is thus unsupported by substantial evidence in the record.

Mr. Schmidt similarly made no efforts to trace the deposits and withdrawals from his various bank accounts to segregate the income and expenses for his business from the household income and expenses. As in *Pollock* and *Lindemann*, he did not attempt to contemporaneously segregate any portion of his business activities to the marital community. Effectively, he worked throughout the marriage to grow his lending business substantially, from approximately \$889,060.00 in capital invested to approximately \$1,112,754.86 in capital invested. Exhibit 5, Tab 2, pages 1 and 13. Yet apart from the meager allowance of \$100.00 per month provided to Mrs. Schmidt, no part of the increase in the value of the enterprise or the income generated from it was allocated to the marital community.

The trial court expressly declined to consider any community interest in the lending enterprise, stating in its Findings of Fact and Conclusions of Law, “the court rejects the ‘all or nothing rule’ of the case of *Pollock v. Pollock*, 7 Wn. App. 394 (1972) in characterizing assets as community or separate. CP 95. In so doing, the trial court failed to properly apply existing law to the dispute at hand in determining whether Mrs. Schmidt had a community property interest in the lending enterprise. Considering the applicable legal authority, the rule is that the marital community is entitled to the value of Mr. Schmidt’s business activities

during his marriage. The trial court abused its discretion by failing to allocate *any* portion of the business to the marital community, notwithstanding that Mrs. Schmidt provided support at home while Mr. Schmidt engaged in the activities documented in Exhibits 4 and 5 to acquire, monitor and service a growing amount of private loans.

Because the trial court improperly characterized the lending enterprise as Mr. Schmidt's separate property in spite of the value of the community contributions during nearly five years of marriage, its property division was erroneous and should be reversed.

- II. The trial court abused its discretion in dividing the parties' property in a manner that resulted in gross disparities between them, and in awarding maintenance in a manner that failed to adequately weigh the needs of the parties with Mr. Schmidt's ability to pay.

In a dissolution proceeding, the trial court is required to make a fair and equitable division of all property, community and separate, before it, considering:

- (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.

RCW 26.09.080.

The purpose of maintenance is to support a spouse until she is able to earn her own living or otherwise become self-supporting. *In re Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). Factors to consider include the financial resources of each party; the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; the standard of living during the marriage; the duration of the marriage; and the time needed by the spouse seeking maintenance to acquire education necessary to obtain employment. *Id.* In considering maintenance, the court is strongly governed by the need of one party and the ability of the other to pay. *In re Marriage of Foley*, 84 Wn. App. 839, 845-46, 930 P.2d 929 (1997). The paramount concern is the economic condition in which the dissolution decree leaves the parties. *In re Marriage of Terry*, 79 Wn. App. 866, 869, 905 P.2d 935 (1995).

A trial court's decision on an award of maintenance is reviewed for abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). "An award of maintenance that is not based upon a fair consideration of the statutory factors constitutes an abuse of discretion." *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996).

In the present case, the trial court's property division left the parties with grossly disparate assets and income. The total value of the property awarded to Mr. Schmidt exceeded \$1.7 million and reflected an increase in his net worth of nearly \$600,000.00 during the course of the marriage:

MR. SCHMIDT'S ASSETS AND LIABILITIES

ASSETS	PREMARITAL OR ACQUIRED AFTER MARRIAGE	VALUE AT MARRIAGE	VALUE TODAY
Schmidt Enterprises ¹	Both	\$889,060.00 capital invested	Approximately \$1,112,754.86 capital invested
LHR1, LLC ²	After Marriage	None	80% of approx. \$450,000.00 property
Bank of America ³	After Marriage	None	\$6,511.07 on 8/6/10
Sterling *2020 ⁴	After Marriage	None	\$29,877.88 on 7/31/10
Sterling *7350 ⁵	Both	Unknown	\$1,216.08 on

¹ Source: Exhibit 5, Tab 2, pages 1 and 13 (Financial Statements). The most recent information prepared by Mr. Schmidt only reflects his 2010 position and does not include other loans about which testimony was taken at trial, including two loans to Ed Anderson for \$38,500.00 and \$5,000.00.

² Source: Testimony of Ed Anderson and Kenneth Schmidt. Mr. Schmidt testified that the loan of Lynn Walker (Exhibit 4, Tab 12) was foreclosed and the matter was resolved by Ms. Walker's delivery of a deed in lieu of foreclosure for a property worth about \$450,000.00 to LHR1, LLC, owned 80% by Mr. Schmidt and 20% by Ed Anderson.

³ Source: Exhibit 5, Tab 4A, page 8. Mr. Schmidt did not produce up-to-date information about this account during discovery or at trial.

⁴ Source: Exhibit 5, Tab 4B, page 5. Mr. Schmidt did not produce up-to-date information about this account during discovery or at trial.

⁵ Source: Exhibit 5, Tab 4C, page 1 and final page. Mr. Schmidt did not produce up-to-date information about this account during discovery or at trial. The letter from Malory

			11/26/10
Sterling *8766 ⁶	Unknown	Unknown	\$59,528.33 on 1/31/09
Sterling Safe Deposit Box ⁷	Believed to be both	Unknown	Unknown
US Bank *4195 ⁸	Both	\$14,861.59	\$409.34 on 5/20/11
US Bank *7292 ⁹	Both	\$77,746.52	N/A – account closed in April 2007
Riverview Community Bank ¹⁰	Premarital	\$4,212.21	N/A – account closed in Nov. 2007
Western United *26019 ¹¹	Premarital	\$16,714.06	\$17,048.01
Western United *23843 ¹²	Premarital	\$27,878.14	0.00 (Cashed out in 2007, final balance \$30,034.35)
Manhattan Life *Former Western United SP1223 ¹³	Premarital	\$32,376.14	\$37,871.56

Gilbert dated Feb. 15, 2007 states that the account was opened in 2004, but the opening balance and the balance at the time of the marriage were never ascertained.

⁶ Source: Exhibit 5, Tab 4D. Mr. Schmidt did not produce up-to-date information about this account during discovery or at trial.

⁷ Source: Exhibit 5, Tab 4E. Mr. Schmidt has never disclosed the contents of the safe deposit box.

⁸ Source: Exhibit 1, Account Statements. The account statements reflect a number of withdrawals and deposits for tens, and sometimes hundreds, of thousands of dollars. Mr. Schmidt was unable to explain the transactions at trial.

⁹ Source: Exhibit 1, Account Statements. The account statements reflect a number of withdrawals and deposits for tens, and sometimes hundreds, of thousands of dollars. Mr. Schmidt was unable to explain the transactions at trial.

¹⁰ Source: Exhibit 5, Tab 4H.

¹¹ Source: Exhibit 5, Tab 5.

¹² Source: Exhibit 5, Tab 6.

¹³ Source: Exhibit 5, Tab 7.

Jackson Nat'l Life ¹⁴	Premarital	Unknown	\$26,079 on 12/17/10
707 SE. Magnoni ¹⁵	Premarital	\$200,000	None - sold
702 SE. Magnoni ¹⁶	After Marriage	N/A	\$260,000 est.
2009 Chevy Malibu ¹⁷	After Marriage	N/A	Unknown, approx. \$14,000 base blue book value
TOTAL ASSETS		\$1,262,848.69	\$1,925,296.13
LIABILITIES			
Mortgage on 707 SE Magnoni ¹⁸	Premarital	(\$130,136.00)	
Mortgage on 702 SE Magnoni ¹⁹	After marriage	N/A	(\$215,010.00)
Car loan ²⁰	After marriage	N/A	(\$9,247.00)
TOTAL LIABILITIES		N/A	(\$224,257.00)
NET WORTH		\$1,132,712.69	\$1,701,039.13

By contrast, the assets and liabilities awarded to Mrs. Schmidt left her with considerable liabilities and only a small amount of property from which to pay them:

¹⁴ Source: Exhibit 5, Tab 8, Tab 9, pp. 2, 8, 14, Tab 11 (Respondent's Answers, p. 4)

¹⁵ Source: Testimony of Kenneth Schmidt and Liubov Schmidt.

¹⁶ Source: Exhibit 5, Tab 10, p. 6 (Assessor's value for 2010).

¹⁷ Source: Position Statement of Respondent

¹⁸ Source: Exhibit 5, Tab 2, p. 13

¹⁹ Source: Position Statement of Respondent

²⁰ Source: Position Statement of Respondent

MRS. SCHMIDT'S ASSETS AND LIABILITIES

ASSETS	PREMARITAL OR ACQUIRED AFTER MARRIAGE	VALUE AT MARRIAGE	VALUE TODAY
Home, Lipetsk, Russia ²¹	Premarital	\$45,000.00	0.00
Travel Agency Business, Lipetsk, Russia ²²	Premarital	\$1,450.00	0.00
Sterling Savings ²³	After Marriage	N/A	\$85.40
Buick ²⁴	Gift	N/A	\$1,000.00
TOTAL ASSETS		\$46,450.00	\$1,085.40
LIABILITIES			
IRS ²⁵	After Marriage	N/A	(\$1,469.64)
Dr. Gerald Craigg ²⁶	After Marriage	N/A	(\$1,067.00)
WWGH ²⁷	After Marriage	N/A	(\$722.00)
St. Mary Medical Center ²⁸	After Marriage	N/A	(\$1,536.00)
Massage Therapy for Women ²⁹	After Marriage	N/A	(\$240.00)
West Richland	After Marriage	N/A	(\$1,853.00)

²¹ Source: Exhibit 3, Tab 7, p. 3; Exhibit 5, Tab 1, p. 48 (Tax Return)

²² Source: Testimony of Liubov Schmidt

²³ Source: Exhibit 3, Tab 2.

²⁴ Source: Position Statement of Respondent

²⁵ Source: Exhibit 3, Tab 4, p. 1.

²⁶ Source: Exhibit 3, Tab 4, p. 9.

²⁷ Source: Exhibit 3, Tab 4, p. 10.

²⁸ Source: Exhibit 3, Tab 4, p. 11.

²⁹ Source: Exhibit 3, Tab 5, p. 25.

Family Dental ³⁰			
Dr. Page ³¹	After Marriage	N/A	(\$800.00)
TOTAL LIABILITIES		0.00	(\$7,687.64)
NET WORTH		\$46,450.00	(\$6,602.24)

The trial court's attempt to ameliorate the gross disparity consisted of an award of \$25,000.00 cash to Mrs. Schmidt. The division thus resulted in an outcome in which Mr. Schmidt retained over \$1.7 million in assets, including the marital home, while Mrs. Schmidt, an immigrant who gave up all of her property and possesses limited skills to support herself, received about \$18,500.00 and some personal belongings, after accounting for her outstanding medical liabilities. Testimony at trial established that she required at least \$10,880.00 in dental work to finish repairing her infected teeth, as well as additional costs for treatment of her chronic pain. The trial court did not, in its ruling, give any consideration to these needs.

The trial court's maintenance award did little to resolve the discrepancy. The evidence presented at trial established that Mr. Schmidt earned a minimum of \$11,317.06 and as much as \$13,417.06 at the conclusion of the marriage:

³⁰ Source: Exhibit 3, Tab 4, p. 7.

³¹ Source: Exhibit 3, Tab 4, p. 6.

MR. SCHMIDT'S MONTHLY INCOME

Income Source	VALUE AT MARRIAGE	VALUE TODAY
Schmidt Enterprises ³²	\$6,965.68	\$12,049.36
Social Security ³³	\$491.00	\$491.00
Retirement pension ³⁴	\$876.70	\$876.70
TOTAL	\$8,333.38	\$13,417.06³⁵

Mrs. Schmidt, on the other hand, was barely able to earn poverty level wages at the conclusion of the marriage:

MRS. SCHMIDT'S MONTHLY INCOME

Income Source	VALUE AT MARRIAGE	VALUE TODAY
Self-Employment ³⁶	\$500 / month (ten times average Russian wage)	Max. \$1,316.16/month (about 125% of U.S. poverty level)
TOTAL	\$500.00	\$1,316.16 max.

³² Source: Exhibit 5, Tab 2, pp. 1, 13. At trial, Mr. Schmidt testified that the Walker loan was foreclosed; this would eliminate \$2,095.00 per month from the current income. Mr. Schmidt testified that additional loans have been made to Robert Aguilar (payments \$95.00 per month) and Ed Anderson (payments \$1,200.00 per quarter). Ed Anderson testified at trial that the Gulak loan was sold for \$12,000.00; this would also eliminate \$400.00 per month income. Accounting for these adjustments, Mr. Schmidt's current monthly income from Schmidt Enterprises would be \$9,949.36.

³³ Source: Testimony of Kenneth Schmidt; Position Statement of Respondent

³⁴ Source: Testimony of Kenneth Schmidt; Position Statement of Respondent

³⁵ If adjusted per Kenneth Schmidt's testimony as described in footnote 32, Mr. Schmidt's total monthly income today is \$11,317.06.

³⁶ Testimony of Liubov Schmidt; Exhibit 3, Tab 1 at p. 1 (total income of \$15,794.00 divided by 12). Luba Schmidt also testified that she has been unable to work regularly since being diagnosed with fibromyalgia, except for her position as the Walla Walla Symphony librarian that pays slightly less than \$200.00 per month. Dr. Gerald Craig also testified that Luba's medical conditions preclude her from steady employment.

In its Findings of Fact and Conclusions of Law, the trial court found that Mr. Schmidt had the financial ability to pay reasonable maintenance and meet his own financial obligations, which Mr. Schmidt estimated in his Position Statement to be about \$2,370.00 per month. Consequently, the maintenance award temporarily provides Mrs. Schmidt with some assurance that she will be able to maintain a roof over her head and provide for some of her ongoing medical needs. But even though the maintenance award leaves Mr. Schmidt with nearly \$7,000.00 per month more than he needs to cover his expenses, no provision was made to provide Mrs. Schmidt with job training or further education to increase her ability to earn more than the \$15,794.00 she generated through private music lessons and employment with the Walla Walla Symphony. As a result, the division and maintenance award leaves Mrs. Schmidt to struggle to escape crushing illness and poverty while Mr. Schmidt continues to earn far more than he needs.

Under the circumstances of this case, the trial court failed to fairly consider the factors that govern an appropriate maintenance award. In Russia, Mrs. Schmidt's education and experience permitted her to generate a relatively comfortable income to support herself and her family. In the U.S., her musical skills permitted her to scrape together a poverty-level subsistence. Although the trial court found that Mrs. Schmidt's

health compromised her ability to work, she should be able to return to gainful employment within one year to 18 months, the trial court neglected to account for the fact that at her existing level of education and training, she was only able to generate \$15,794.00 per year. The property division afforded no means to Mrs. Schmidt to obtain additional education or job training that would permit her to increase her earning potential. Thus, the economic condition in which the trial court's property division and maintenance award left Mrs. Schmidt was dependent and impoverished, while Mr. Schmidt accrued excess income and possessed considerable wealth and resources.

The economic circumstances resulting from the trial court's decree are grossly unfair and inadequate to Mrs. Schmidt. It allocated no value to the domestic services she provided to Mr. Schmidt for nearly five years or to the property she contributed to the marriage, and awarded the entire value of all of the wealth generated during the marriage to Mr. Schmidt. It failed to fairly consider her circumstances as an immigrant with limited employment opportunities. The award in this case does not reflect a just and equitable consideration of the applicable factors, and should be reversed.

VI. CONCLUSION

The trial court expressly rejected and refused to apply controlling law in evaluating whether Mr. Schmidt's business enterprise was subject to any community interest. It failed to hold Mr. Schmidt to his burden to prove by clear and convincing evidence that the loans were his separate property, maintained separately and without commingling from community funds. Because the trial court did not correctly characterize the lending enterprise in making its property division, the division is erroneous and should be reversed.

The trial court further failed to provide for Mrs. Schmidt's uncontroverted medical and dental needs in entering a property division and maintenance award that was so grossly disproportionate as to leave the immigrant spouse battling poverty while the citizen spouse retained all of the property grown and accumulated during the marriage. Its division was so far from restoring the parties to their pre-marriage conditions as to be an abuse of discretion. The decree should be reversed.

RESPECTFULLY SUBMITTED this 10th day of July, 2012.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

R. Gary Ponti
McAdams Ponti Wernette & Van Dorn
103 E. Poplar
Walla Walla, WA 99362

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16th day of July, 2012 in Walla Walla, Washington.


Andrea Burkhart