

FILED

Apr 17, 2013

Court of Appeals

Division III

State of Washington

NO. 31073-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
Division III

In re the Marriage of:

GENE EDWARD WELTON,

Appellant,

and

MARINA MARTIN-WELTON,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

Marina Martin and Gene Welton were married for roughly 12 years, from 1997, until their 2009 separation. During that time, substantial evidence demonstrates that Mr. Welton was the primary manager of Welton Orchards and Storage, L.L.C. ("LLC") and that his 1/3 interest in the LLC grew very substantially. While his share of the LLC's rentals of its various properties was sometimes as high as \$175,000 in a year, his draws were never more than about \$40,000 per year. The LLC partners' capital accounts went from <\$347,088> in 2003, to \$357,866 in 2010, a roughly \$600,000 increase. The LLC's "other investments" went from about \$12,000 in 2007, to about \$487,000 in 2010. The LLC also purchased hundreds of thousands of dollars' worth of property during the marriage. Yet Mr. Welton – who ran the entire operation – drew only about \$100 a month more than he paid one of his employees.

Mr. Welton received, as his separate property, his entire interest in the LLC. He stipulated that this was worth roughly \$1.1 million to him. Ms. Martin got an "equalizing" judgment of roughly \$180,000. That number is 1/2 the (conservatively estimated) increase in the value of the LLC during the marriage. While not unjust to him, this result is unjust to Ms. Welton.

STATEMENT OF THE CASE

The trial court's ten Findings of Fact (F/F) cover over eight pages and roughly 40 paragraphs. CP 153-62 (copy attached). Of these, Mr. Welton assigns error to ten sentences (or portions of them). See BA App. A at 158-60. Nine of the ten Findings are wholly unchallenged, and all of the unchallenged findings are verities here. See, e.g., *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Every fact stated here is supported by unchallenged findings, accurate record citations, or both.¹

A. Marina Martin married Gene Welton in July 1997, they separated in March 2009, and the 12-year marriage was dissolved in August 2012.

Ms. Martin married Mr. Welton in July 1997. CP 6, 154. They separated in March 2009. CP 11, 122, 154. They had no children together. CP 6, 154. At the time of the 2012 dissolution, Mr. Welton was 52, and Ms. Martin was 55. CP 5, 11, 154.²

¹ Unfortunately, this is in sharp contrast to the opening brief. For instance, of the 11 sentences in Mr. Welton's "Background," four have no citations. BA 6-7. Indeed, there are statements throughout Mr. Welton's brief that are not supported by the record. The brief falls well short of RAP 10.3(a)(5).

² Ms. Martin agrees that unchallenged F/F 1.b. has a typo saying he was 62.

B. Ms. Martin works at Costco, but disabilities limit her earning capacity for her 10 years of remaining work life .

In 1995, Costco transferred Ms. Martin from Alaska to its East Wenatchee store. CP 155; RP 390, 393. She earned less in Wenatchee than she had earned in Alaska. *Id.* Ms. Martin worked at various positions, including cashier, boxing, membership, the vault, data entry, and marketing. RP 39-91. Ms. Martin worked for Costco in these capacities from 1995 to 2002. *Id.*, CP 395.

Between 2000 and 2006, however, Ms. Martin suffered intermittent, debilitating back problems. CP 155; RP 394-95. She was off work for the better part of two years, and then Costco let her go in 2002. RP 395-96. Ms. Martin saw many doctors. RP 398. She sometimes could not stand on her feet for long periods. RP 395-96. She received short-term and then long-term disability payments from insurance she purchased, eventually qualifying for Social Security disability. CP 155; RP 397-98.

Ms. Martin finally received treatment that enabled her to return to work at Costco in June 2008, terminating her SSI. CP 155; RP 394, 399. She tried to get back on at the East Wenatchee Costco, but her son was employed there, so the company would not allow her to return. CP 155; RP 395, 400. She instead took a

job at the Woodinville Costco, in stocking and produce. CP 11, 155; RP 400.

She suffered a work injury in January 2009. CP 156; RP 291, 384. She was treated by Dr. Julie Hodapp at the Seattle Virginia Mason for lumbar pain, cervical strain, a rotator cuff injury, headaches, earaches, and vertigo. CP 156; Ex 9U. Ms. Martin returned to work in July 2009, but reinjured her shoulder. CP 157; RP 291. Her pain can be quite severe, including acute symptoms and migraines, as confirmed by objective testing. RP 291-96, 348-49. She has work restrictions on using her right arm, overhead weight lifting, and physical capacity. CP 156-57; RP 350-51, 382-83; Ex 9U. The trial court found no evidence that Ms. Martin is malingering or exaggerating her symptoms. CP 157.

Despite these challenges, Ms. Martin has been attending an online school, has earned nearly straight As, has obtained her AA degree, and hopes to complete a Bachelor's, and perhaps even a Master's Degree. CP 156; RP 428-30; Ex 6i. She currently has about \$20,000 in student-loan debt. RP 429; Ex 6h.

Mr. Martin's earnings in 2006 were \$2,932; in 2007, \$9,601; in 2008, \$25,745; in 2009, \$23,600, and in 2010, \$19,143. CP 156; RP 424, 515; Ex 6f. She had an in-home business that never

earned significant income. CP 156; RP 418. At the time of trial, she paid \$200 a month to stay in a room in a friend's home two nights a week. RP 380-81.

During the dissolution proceedings, Ms. Martin was forced to sell a mobile home for \$30,000 to pay for her medical bills, moving expenses, and attorney fees. CP 158; 460-61. Those expenses depleted all of those funds. *Id.*

C. Gene Welton stipulated that his 1/3 interest in the LLC is worth \$1,095,870, based upon an undisputed LLC asset value of close to \$6 million.

In the year before the parties were married, Mr. Welton's parents gave him a 1/3 interest in their orchard business, Welton Orchards and Storage, LLC. CP 154; RP 130; Ex 2c. His parents had been farming in East Wenatchee since 1965. CP 154; RP 7. They formed the LLC in 1995. *Id.* Mr. Welton worked for the family business his entire adult life. CP 154.

The parties stipulated to the values of Mr. Welton's interests in the LCC and its properties. RP 4. Currently, the LLC owns all of the Orchard's assets and a 30,000-bin-capacity controlled-atmosphere warehouse. CP 154. The stipulated value of the warehouse and the land it sits on is \$2,898,100. *Id.*

It is also stipulated that at the time of trial, Mr. Welton's 1/3 interest in the LLC was worth \$1,095,870. CP 154. Ms. Martin's expert valued its net value at precisely that. Ex 10. He valued the LLC's land, trees and improvements at \$6,136,696. *Id.*; RP 263-71. But the parties stipulated that the LCC's real estate was worth only \$5,688,500. CP 155; RP 4.

Mr. Welton does not pay anything for his housing, including property taxes and insurance; does not pay for his health or dental insurance; does not even pay for his utilities and telephone – the LLC pays for all of that for him. CP 155. The LLC also paid his attorney fees in this action. RP 83-84.

D. Gene Welton repeatedly refused to comply with court orders, and he and his parents were not forthcoming about the LLC's assets.

The trial court sets forth a nightmarish procedural history at CP 157-58. Mr. Welton does not deny any of it. He was repeatedly held in contempt and/or sanctioned for violating the court's orders to pay various amounts. *See, e.g., Id.*; CP 264. The trial court further found that Mr. Welton's parents "have not been forthcoming with all of the financial records of the L.L.C." CP 159. Mr. Welton – a 1/3 owner – was repeatedly compelled to make discovery and disclose documents, but he did not. CP 267, 297-98.

ARGUMENT

A. Standards of Review.

Mr. Welton concedes that the standard of review for property divisions under RCW 26.09.080 is abuse of discretion. BA 14-15 (citing, *inter alia*, *In re Marriage of Schweitzer*, 81 Wn. App. 589, 595-96, 915 P.2d 575 (1996), *aff'd* 132 Wn.2d 318 (1997); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). He further concedes that characterization of property as community or separate is a question of law, that factual issues are reviewed for substantial evidence, and that expert testimony is sufficient to support a valuation. BA 15-16 (citing numerous cases).

B. Controlling Supreme Court authority holds that Mr. Welton's affidavit of prejudice was untimely, and he invited any alleged error: this argument is frivolous.

Mr. Welton first argues that Judge Small had no choice but to recuse pursuant to his affidavit of prejudice under RCW 4.12.040 and 4.12.050, and inapposite cases like *State v. Dixon*, 74 Wn.2d 700, 703, 446 P.2d 329 (1968); *In re Marriage of Tye*, 121 Wn. App. 817, 820-21, 90 P.3d 1145 (2004); and *In re Marriage of Hennemann*, 69 Wn. App. 345, 848 P.2d 760 (1993). He essentially claims that because the statute says that "the

arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, . . . shall not be construed as a ruling or order involving discretion within the meaning of this proviso," his stipulation to continue the trial with Judge Small did not constitute "any order or ruling involving discretion," so his affidavit was timely. He is incorrect.

Mr. Welton fails to cite controlling authority that is precisely on point – and precisely rejects his argument: *In re Recall of Lindquist*, 172 Wn.2d 120, 129-31, 258 P.3d 9 (2011).³ *Lindquist* involved a recall petition against Lindquist, whose lawyer sought a continuance due to Lindquist's vacation plans, which the trial court denied; Lindquist then affidavited the judge. 172 Wn.2d at 126. The judge dismissed the affidavit as untimely, addressed the merits of the recall petition, and also dismissed it. *Id.* at 127.⁴

On appeal, the petitioners raised precisely the same argument that Mr. Welton raises here: the statute says that

³ It should go without saying that RPC 3.3, Candor Toward the Tribunal, requires that a lawyer may not ethically fail to disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

⁴ That judge also dismissed the affidavit because it was not supported by a written motion, but the timeliness issue is independently dispositive.

calendar issues are not discretionary rulings. *Id.* at 130-31. The

Supreme Court ruled as follows (*id.*):

Petitioners [argue] that “[a]rranging the calendar or setting matters for hearing do not constitute discretionary acts under [chapter 4.12 RCW] for purposes of barring filing of an affidavit [of] prejudice.”

Petitioners cite *Rhinehart v. Seattle Times Co.*, arguing that Judge Cayce used no discretion in denying the continuance because the hearing date was mandated by RCW 29A.56.140. 51 Wn. App. 561, 578, 754 P.2d 1243 (1988) (“The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court’s discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party’s request.”).

On the same page that petitioners cite, however, the *Rhinehart* court distinguishes preparing the calendar from granting a continuance, noting that “[r]ulings involving the exercise of discretion include the granting of a continuance.”

In the present case, Judge Cayce was required to invoke his discretion in weighing whether delaying the hearing to allow Lindquist to be present justified continuing the hearing beyond the statutory deadline. [Some cites omitted; some emphases added; paragraphing added.]

Lindquist – and for that matter, the 1988 *Rinehart* case – plainly disposes of Mr. Welton’s argument. Judge Small exercised his discretion in granting the continuance. No abuse of discretion occurred.

Mr. Welton’s reliance on *Hennemann* is obviously misplaced. BA 19-21. There, the “record indicates the trial judge’s

only ruling prior to the filing of the affidavit of prejudice was the entry of a form order on pretrial procedures.” 69 Wn. App. at 347. Entering form scheduling orders falls within the statutory exception because no discretion is involved – it is pure scheduling. *Id.* **Hennemann**, like the other, similar cases Mr. Welton cites is materially distinguishable from this case.

And there is yet another reason that Mr. Welton is wrong: he stipulated to a trial with Judge Small:

[The parties] hereby stipulate to continue . . . the second set trial date of December 3-4, 2009, **with Judge Small**.

CP 19 (emphasis added). Mr. Welton may not stipulate to a trial with Judge Small, and then affidavit him. Whether this is deemed invited error, waiver, or judicial estoppel, Mr. Welton is wrong. See, e.g., **City of Seattle v. Patu**, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002) (party may not set up error in trial court and complain about it on appeal); RAP 2.5(a) (party waives argument by failing to raise it below); **Arkison v. Ethan Allen, Inc.**, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (judicial estoppel precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position).

Where, as here, Mr. Welton sought to continue the trial *with Judge Small*, he cannot properly claim error on appeal. In light of the controlling authority and his stipulation, Mr. Welton's lead argument is frivolous. His appeal does not get better from here.

C. The Community was obviously undercompensated, and the LLC unquestionably increased in value, rendering his equitable-lien arguments false and frivolous.

Mr. Welton's next series of arguments is extremely difficult to understand. See BA 21-33. Beyond citing unremarkable, boilerplate statutory and case law that has little relevance here, the gravamen of his arguments seems to be that Ms. Martin failed to prove that he was undercompensated or that the LLC increased in value due to his community efforts during the marriage. *Id.* As discussed *infra*, substantial evidence exists on both issues, so these arguments fail.

1. While insufficiently fair to Ms. Martin, Judge Small's distribution of more than \$1 million to Mr. Welton and less than \$200,000 to Ms. Martin is not unjust or inequitable to Mr. Welton.

But before reaching the substantial evidence issues, Mr. Welton's arguments fail for an entirely different reason: they are apparently premised on the alleged "sanctity" of his separate property. See, e.g., BA 22-23. It has long been the law of Washington that a trial court does not abuse its discretion by

awarding separate property if the distribution is just and equitable. *In re Marriage of Irwin*, 64 Wn. App. 38, 48, 822 P.2d 797 (1992); accord, *In re Marriage of Konzen*, 103 Wn.2d 470, 472, 478, 693 P.2d 97 (affirming distribution awarding wife 50 percent of community property and 30 percent of husband's separate property) cert. denied, 473 U.S. 905 (1985); *Ramsdell v. Ramsdell*, 47 Wash. 444, 445–46, 92 P. 278 (1907) (affirming distribution awarding the wife 100 percent of the husband's separate property); *In re Marriage of Griswold*, 112 Wn. App 333, 346, 48 P.3d 1018 (2002) (affirming distribution awarding wife 50 percent of community property and a percentage of husband's separate property); *In re Marriage of Zahm*, 91 Wn. App. 78, 86, 955 P.2d 412 (1998), *aff'd*, 138 Wn.2d 213 (1999) (even if bank account was entirely separate property, trial court properly divided it "to reach a just and equitable distribution"). The character of the property is relevant, but not dispositive:

This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property. The character of the property is a relevant factor which must be considered, but is not controlling.

Konzen, 103 Wn.2d at 478 (affirming an award to the wife of 50% of the community property and 30% of the husband's separate property). The *Konzen* Court disapproved *Bodine v. Bodine*, in which the Court had held that one spouse's separate property may be awarded to the other spouse only in "exceptional" situations. 103 Wn.2d at 477 (citing *Bodine v. Bodine*, 34 Wn.2d 33, 35, 207 P.2d 1213 (1949)). Mr. Welton improperly elevates this one factor.

Rather, a division of property must be just and equitable in light of both parties' circumstances at the time of the dissolution. RCW 26.09.080. In addition to the parties' need and ability to pay, the court considers the parties' ages, health, physical conditions, education, and employment history. See, e.g., *Friedlander v. Friedlander*, 80 Wn.2d 293, 305-06, 494 P.2d 208 (1972) (citing *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 433 P.2d 209 (1967)). Future earnings prospects are also relevant. *Id.*

There is no dispute here that Judge Small considered all of the relevant factors. See CP 162-63. While Mr. Welton was rapacious enough to ask in closing that Ms. Martin be left <\$6,387> in debt, while he be left over \$1 million to the good, the trial court very quickly ruled that such a distribution would not be just and equitable. RP 579, 595. He was right: the court's primary concern

must be the economic condition of the parties upon entry of the decree. *In re Marriage of Matthews*, 70 Wn. App. 116, 121, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993).

Ultimately, all of Mr. Welton's talk about the character of his separate property is quite misleading: the trial court characterized his interest in the LLC as his separate property and gave it entirely to him. CP 164, 167, 349. Ms. Martin did not receive *any* of his separate property, but rather received an equalizing judgment to render the distribution 50/50. CP 167-68.⁵ The only issue here is whether the equalizing judgment is just and equitable.

That question is not even debatable. Mr. Welton received a net distribution of \$1,004,605. CP 347-49. Without the equalizing judgment, Ms. Martin received a net distribution of \$3,853, although she is deeply in debt, while he lives off the fat of his LLC. *Id.* Even in the judgment – which is very difficult to collect – she received only \$180,786.56. CP 169. While this is not enough, it is certainly not unjust to Mr. Welton.

⁵ Of course, *any* equalizing award payable post-dissolution – like the equalizing judgment here, or all maintenance awards – will be paid from separate property: all of the property will have been distributed as the parties' separate property. Obviously, that does not render all of them "disfavored."

Trial courts commonly use equalizing judgments when it is not otherwise possible to "conveniently effectuate" a just and equitable distribution of assets:

In making a property division, it is not always possible to conveniently effectuate a "present allocation of property to each party, and in a proper case, the property may be awarded to one with a duty to make compensating payments to the other, ..."

In re Marriage of Young, 18 Wn. App. 462, 465-66, 569 P.2d 70 (1977) (quoting *Thompson v. Thompson*, 82 Wn.2d 352, 357-58, 510 P.2d 827 (1973)). This is what Judge Small did. He obviously did not abuse his discretion in this regard.

2. The community was grossly undercompensated for Mr. Welton's community-property efforts.

Mr. Welton repeats – over and over – that Ms. Martin provided "no evidence" that *he* was undercompensated. BA 24, 26-28. While this is false, it is also irrelevant: the question is whether *the community* was undercompensated for his services. Under the following evidence, that is obvious.

The following work evidence is entirely unchallenged here:

- ◆ Mr. Welton "worked exclusively for the orchard during the entire marriage." CP 160 (F/F 7h).
- ◆ Also during the marriage, Mr. Welton's job duties increased over time as he took over all the work as his parents slowed down, starting in 1999. CP 160 (F/F 7i).

- ◆ Prior to the separation, Ms. Martin and Mr. Welton planned to fully take over the LLC operations. CP 161 (F/F 7k).
- ◆ Mr. Welton "supervises all of the L.L.C.'s employees, including as many as 50 during harvest." CP 160 (F/F 7h).
- ◆ Mr. Welton on call 24/7 and worked 12-16 hour days at peak times, including on weekends. *Id.*
- ◆ "His last vacation was in 2009." *Id.*

Similarly unchallenged here is the following payment evidence:

- ◆ In 2009, the LLC paid Mr. Welton \$3,000 per month to run its entire operations. CP 160 (F/F 7k).
- ◆ Mr. Welton was ordered to pay \$735 per mos. temporary maintenance beginning January 2010. CP 157 (F/F 5a).
- ◆ That same month, the LLC decreased Mr. Welton's pay to \$2,500 per month. CP 160-61(F/F 7k).
- ◆ The court then reduced Mr. Welton's maintenance payment to \$635 per month in March 2010. CP 157 (F/F 5a).
- ◆ By July 2010, Mr. Welton owed Ms. Martin \$3,175 in unpaid maintenance, and \$776 in fees. CP 157 (F/F 5b).
- ◆ Mr. Welton paid Ms. Martin \$3,951 in July 2010. *Id.*
- ◆ At some point, the LLC lowered Mr. Welton's pay to \$2,000 per month. CP 161 (F/F 7k); RP 213-14.
- ◆ The court terminated Mr. Welton's maintenance obligation in November 2010, with him owing \$2,540 to Ms. Welton. CP 157 (F/F 5b).
- ◆ At the time of trial, the LLC was paying Mr. Welton \$2,000 per month to run its entire operations (described above). CP 160 (F/F 7j).

Compare those facts with the following unchallenged facts:

- ◆ At the same time, the LLC paid one of its employees, Vincente Cruz, \$1,900 per month. CP 160 (F/F 7k).
- ◆ Mr. Cruz had worked for the LLC for 17 years. RP 114.
- ◆ Mr. Cruz, like Mr. Welton, received free housing. RP 410.
- ◆ Mr. Cruz testified that his job was checking on the cutting and harvesting, and also said he "does everything"; but there is no evidence that he runs operations, manages business, supervises 50 employees, or is on call 24/7. *Id.*; RP 114.

Based on the above unchallenged findings, as soon as Ms. Martin received temporary maintenance, Mr. Welton's pay began to decrease, while his work level continued to increase. He was on call 24/7, and sometimes worked 16 hour days. The LLC paid one employee only \$1,200 **a year** less than it paid him. No evidence shows that the community was **ever** compensated more than these amounts during the marriage.⁶ The judge could easily determine that the community was undercompensated for his community services based on this substantial, unchallenged evidence.⁷

Further, the following income evidence is also unchallenged:

⁶ As noted above, the community's housing was also provided, but the trial court properly concluded that this was insufficient, where a mere employee received the same benefit for his family. CP 167, C/L N4.

⁷ Mr. Welton's claims that Ms. Martin had to put on expert testimony are meritless. BA 27-28. No authority requires a specific type of evidence.

- ◆ The LLC had total sales income in 2010 of \$774,342. CP 159 (F/F 7d).
- ◆ The LLC had income from "other investments" that grew from \$12,587 in 2007, to \$487,599 at the end of 2010. CP 159 (F/F 7f); RP 261-62; Ex 10.
- ◆ The LLC partners' capital accounts went from a low of <\$347,088> in 2003, to a high of \$357,886 in 2010. CP 159-60 (F/F 7g).

The trial court could easily conclude from all of the above unchallenged evidence that the community was historically undercompensated⁸ for the work Mr. Welton did for the LLC and for the success to which his community labors substantially contributed. These unchallenged facts lead to the reasonable conclusion that the Weltons drove money back into the LLC, and into "other investments," earlier to build the business at the community's expense, and later to avoid increasing Mr. Welton's income, and consequently, Ms. Martin's maintenance. See, e.g., CP 165, C/L 12 ("by routinely foregoing draws equal to his real estate income; that is, **agreeing to be underpaid**, the net capital accounts ... increased substantially This increase of over

⁸ Indeed, Mr. Welton's 2004 K-1 shows net rental income of \$36,451, but a distribution of only \$15,928; and his 2005 K-1 shows net rental income of \$75,079, but a distribution of only \$18,000. Ex 2j.

\$600,000 during the marriage, was again due in large part to the petitioner's efforts" (emphasis added)).

In addition, while challenged, the following additional income findings are both relevant and well supported by the record cited:

- ◆ In 2009, the LLC's net rental income was \$392,648 (Ex 2j p.26,⁹ 2009 tax return, Schedule 8825). CP 159 (F/F 7e)
- ◆ Mr. Welton's share of the rental income was \$129,574 (Ex 2j, p. 16, 2009 Schedule K-1 for Gene Welton, "Net rental real estate income (loss)"). *Id.*
- ◆ But he took just \$42,768 in draws in 2009 (Ex 2j, p. 16, "Guaranteed payments"). *Id.*
- ◆ In 2010, the LLC's net rental income was \$250,452 (Ex 2j, 2010 tax return, Schedule 8825). CP 159 (F/F 7d).
- ◆ Mr. Welton's 2010 share of rental income was \$82,649 (Ex 2j, 2010 Schedule K-1 for Gene Welton, "Net rental real estate income (loss)"). *Id.*
- ◆ But he took just \$32,570 in 2010 (Ex 2j, 2010 Schedule K-1 for Gene Welton, "Guaranteed payments").

The completely supported findings,¹⁰ together with those stated above, amply support the trial court's conclusion that the

⁹ The 2009 tax documents may be numbered in small handwriting in the lower right-hand corner.

¹⁰ Mr. Welton's assignment of error to these findings is equally as troubling as his other shortcomings noted so far. These assignments are frivolous.

community was "grossly" undercompensated for Mr. Welton's community efforts. CP165 (C/L J1).

3. Ms. Martin proved how much the community was undercompensated for Mr. Welton's community efforts.

Mr. Welton also argues that "even if" *he* was undercompensated, Ms. Martin was required to prove by exactly how much. BA 29-33. She did:

- ◆ The trial court entered unchallenged findings that the LLC purchased two parcels during the marriage for \$260,000 and \$76,000. CP 155 (F/F 2d). After the separation – but still during the marriage – the LLC acquired additional property worth \$235,000. *Id.* This totals a \$571,000 increase just in LLC property, but the trial court accounted for only the \$336,000 acquired before separation. CP 164 (C/L I1), 165 (C/L I3).
- ◆ The trial court also counted the unchallenged \$305,083 in "other investments" that the LLC had acquired by 2009. CP 159 (F/F 7f), 164 (C/L I1), 165 (C/L I3).
- ◆ He also counted the unchallenged \$600,000 increase in the partners' capital accounts between 2003 and 2009. CP 159-60 (F/F 7g), 165 (C/L I3).

This totals the \$1,241,083 in increased value the LLC enjoyed primarily due to Mr. Welton's primary management of the LLC's business activities. CP 165 (C/L I3).

But the trial court took only 1/3 of the increase in the real estate and other investments through 2009, plus the total value of

the capital accounts at the end of 2009 (\$274,139). *Id.*; see also, Ex 2j at p. 28 (2009 Schedule L). Mr. Welton's share of that was \$305,074 (1/3 of \$915,222). As noted above, the trial court also found that the community was shorted roughly \$87,000 in draws in 2009, and roughly \$40,000 in 2010, and the evidence shows similar losses going back to 2004, all totaling well over \$200,000; but the trial court did not count any of that.

In short, Ms. Martin amply proved precisely how much Mr. Welton's undercompensated efforts increased the value of the LLC: at least \$305,074. It is unchallenged here that beginning in 1999, Mrs. Lilian Welton cut back due to health problems, Mr. Mel Welton also cut back and only "occasionally" helped out, and Mr. Gene Welton's duties concomitantly increased over time. CP 160 (F/F 7i). But the community did not receive the increased value primarily obtained through his efforts – Mr. Welton did. Again, Mr. Welton's argument is frivolous.

4. Mr. Welton's other equitable-lien arguments are equally frivolous.

Mr. Welton next argues that the trial court "must" offset the rental value of the home and his inadequate wages against the equalizing judgment it entered. BA 33-40. For this "must"

proposition, he cites only *Connell v. Francisco*, a case involving a committed intimate relationship (f/k/a “meretricious relationship”). BA 33 (citing *Connell*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995)). *Connell* obviously has no application in a dissolution action. This claim is frivolous.

Mr. Welton also notes that a trial court “may” offset benefits received by the community. BA 33-34 (citing *In re Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984); *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 870, 855 P.2d 1210 (1993)). This assertion is legally accurate, but the trial court expressly determined that the rent-free residence was insufficient, and the monthly payments were grossly insufficient, and it saw no need to offset them. In light of the trial court’s failure to compensate Ms. Martin for the community’s massive losses on the LLC’s rental properties, this is fair. More importantly, the overall distribution is more than just and equitable to Mr. Welton – a challenge even he cannot bring himself to make – there was no abuse of discretion in not giving him an offset.

Mr. Welton argues – yet again, and at great length – that the findings that the LLC “thrived financially” are not supported by substantial evidence. BA 35-40. This is a mere exercise in re-

arguing his facts. *Id.* There are contrary facts in every case, but the substantial evidence standard of review is very well settled:

The trial court's findings of fact will be accepted as verities by the reviewing court so long as they are supported by substantial evidence. *Ferree v. Doric Co.*, 62 Wn.2d 561, 568, 383 P.2d 900 (1963). Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000).

In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 889 (2013). In other words, the Court searches for evidence that supports the findings. It need not bother with Mr. Welton's alleged evidence, which the trial court rejected.

The findings are well supported the evidence cited above, which need not be repeated here. A few points can be addressed, however. First, for the umpteenth time Mr. Welton implies that because there is no evidence of the LLC's value when the parties married in 1997, the trial court could not find that its value increased during the marriage. BA 35. This is obviously illogical. The trial court found – on ample evidence – that the LLC's value increased during the marriage. That is all that is required.

Second, Mr. Welton essentially argues that because his parents had to make capital contributions to the LLC over the

years, the trial court cannot find his community efforts primarily caused the LLC's substantial increases in assets. Again, this is a fact argument, albeit not one made to the trial court. See RP 570-79. "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a)). The Court should exercise its discretion not to reach this argument, or reject it in any event.

D. This Court should uphold the trial court's \$10,000 fee award to Ms. Martin, and award her fees based on her need and Mr. Welton's ability to pay, his intransigence, and the frivolous nature of this appeal.

Mr. Welton has the temerity to argue that Judge Small not only could not award Ms. Welton fees based on her need and his ability to pay, but that this \$10,000 award shows how biased Judge Small was against him. BA 40-41 & n.10. It is sad to see a grown man who has assets worth well over \$1 million, while his ex-wife received a judgment against him of only \$180,786.56, arguing that he does not have the ability to pay because his parents won't let him. *Id.* He has the assets and the earning capacity. Ms. Martin plainly has the need. This Court should affirm the trial court's

award as not an abuse of discretion, and also award Ms. Martin fees on appeal under RCW 26.09.140 and RAP 18.1.

Ms. Martin also has a Charging Order that Mr. Welton has utterly failed to challenge on appeal – an order entered due to his incredible intransigence. This frivolous appeal is consistent with his contemptuous pattern throughout these proceedings. This Court should also affirm the award to Ms. Martin, and award her fees on appeal, due to his intransigence and the frivolous nature of this appeal. RAP 18.9; *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 711, 829 P.2d 1120 (1992). He raises no debatable issues on which reasonable minds might differ, and each abuse of discretion and substantial evidence argument he raises is so devoid of merit that there is no reasonable possibility of reversal. See, e.g., *Fay v. N.W. Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990); *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 217, 194 P.3d 280 (2008) (citing *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998)).

CROSS-APPEAL

A. Assignment of Error & Issue.

Ms. Martin assigns error to the trial court's failure to award her the amount she reasonably requested at the close of trial, \$300,000, whether through an equalizing judgment, maintenance, or otherwise. RP 588. Ms. Martin is left nearly destitute at this point, and the Weltons have amply demonstrated their unwillingness to bow to the trial court's judgment. Judge Small abused his discretion in not awarding her enough because the award is not just or equitable to her. The Court should remand for entry of an equalizing judgment in her favor, together with a revised Charging Order against the LLC for \$300,000.

B. Statement of the Case.

The facts are fully stated above and incorporated here.

C. Argument.

If, at this point, the Court is not firmly convinced that the trial court's award is not fair and equitable to Ms. Martin, there is not much more to say. To leave a 12-year marriage at age 55, with nothing to show for it, but with multiple disabilities, while your ex-husband continues to live rent-free and enjoy the fruits of his more than \$1 million in assets – a number that will triple when his parents

pass away – is devastating. It also feels massively unjust and unfair to Ms. Martin.

The distinguished judge's equalizing judgment is well within his discretion as a legal matter, but equitably about half what it should be. See, e.g., *Young*, 18 Wn. App. at 465-66 (when community property is insufficient, "in a proper case, the property may be awarded to one with a duty to make compensating payments to the other" (quoting *Thompson*, 82 Wn.2d at 357-58)). Alternatively, the court's \$0 in maintenance is neither just nor equitable, and the court certainly could order maintenance. See, e.g., *In re Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984) ("Where the assets of the parties are insufficient to permit compensation to be effected entirely through property division, a supplemental award of maintenance is appropriate").

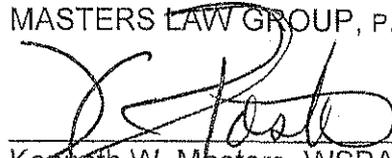
This Court cannot reverse unless it is firmly convinced that Judge Small's decision is beyond his discretion. Contrary to Mr. Welton's claims, separate property is not inviolate. But again, if the Court is not convinced at this point, multiplying the arguments will not help. Ms. Martin asks for a remand for a larger judgment.

CONCLUSION

The Court should affirm as to Mr. Welton's appeal and award Ms. Martin fees on appeal. It should also reverse on her cross appeal and remand for entry of a just and equitable distribution.

RESPECTFULLY SUBMITTED this 17th day of April, 2013.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 17th day of April 2013, to the following counsel of record at the following addresses:

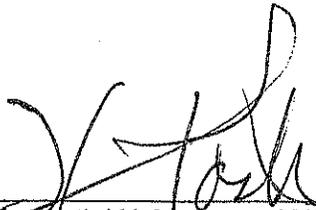
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B
FILED

AUG 18 2012

KIM MORRISON
CHELAN COUNTY CLERK

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered via hand delivery/US Mail facsimile a copy of this document to Michael Vannier Attorney for Petitioner

Jamela Wolgast
Dated: 6-21-12 at Wenatchee, Washington

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**SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY**

In re the Marriage of:)	
GENE EDWARD WELTON,)	NO. 09-3-00159-4
)	
Petitioner,)	FINDINGS OF FACT AND
and)	CONCLUSIONS OF LAW
)	
MARINA MARTIN-WELTON,)	
)	
Respondent.)	

THIS MATTER having come before the court on December 8, 9, 2011 and January 24, 2012, and the court having heard the testimony of the witnesses, reviewed the exhibits and considered the following: The Clerk's minutes of all pretrial hearings, all pre-trial orders regarding maintenance and attorneys' fees, Order to Compel dated October 28, 2011, Order Permitting Entry onto Property on Shortened Notice, Protection Order and Denial of Sanctions dated November 22, 2011, Petitioner's Trial Brief, Trial Brief of Respondent, Supplemental Trial Brief of Respondent, all Trial Exhibits admitted into evidence, the court's trial notes, the transcripts of the testimony of Christopher Stone and Steve Stone, statutory authority – RCW 26.09.080, .090, and .140, cases In re Marriage of Konsen, 103 Wn.2d 470 (1995), In re Marriage of Griswold, 112 Wn.App 333 (2002), and otherwise being familiar with the records and files herein, submits the following

FINDINGS OF FACT

1
2 1. General and Jurisdictional.

3 a. The parties met in 1996 at the East Wenatchee Costco which was the wife's
4 former place of employment. The parties were married on July 26, 1997, and separated on March
5 29, 2009. There were no children of the marriage, and the wife is not pregnant.
6

7 b. Gene Welton is 62 years old. Marina Welton is 55 years old. Mr. Welton
8 graduated from Eastmont High School in 1978. He has worked for the family orchard and
9 controlled atmosphere warehouse his entire adult life. The husband has two brothers. The
10 petitioner/husband is the only son who has worked for the family orchard business.
11

12 2. Welton Orchards and Storage, L.L.C.

13 a. The family orchard began in 1965. Originally, the orchard and controlled
14 atmosphere facility were owned and operated by the petitioner's parents, Mel and Lillian Welton.
15 Welton Orchards and Storage, L.L.C. was formed by petitioner's parents. The Limited Liability
16 Company owns all of the orchards' assets and controlled atmosphere warehouse. The orchard
17 primarily includes a variety of apples and pears. The controlled atmosphere warehouse has a 30,000
18 bin storage capacity. As of the date of trial, the warehouse and the land it sits on had an assessed
19 market value of \$2,898,100.
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23 b. On January 1, 1996, the petitioner's parents gifted Petitioner a 1/3 interest in the
24 L.L.C. before he married the respondent. The parties stipulated the petitioner's minority interest in
25 the L.L.C. is currently worth \$1,095,870.
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1 c. The parties stipulated the fair market value of the real estate owned by the
2 L.L.C. was \$5,688,500.00, including the petitioner's parents' home. Excluding the value of their
3 home, the petitioner's 1/3 interest in the L.L.C. would be worth \$1,018,000.

4 d. In 2000, the respondent disclaimed her interest in eight parcels of property
5 owned by the L.L.C. These parcels are valued at \$5,352,500. The L.L.C. later purchased two
6 additional parcels for \$260,000 and \$76,000 during the marriage and before separation. After
7 separation, the L.L.C. acquired the Stimus property for an additional \$235,000.
8

9 c. During the marriage, the parties lived in a double-wide modular home, rent free,
10 that was owned by the L.L.C.. The home was on a parcel valued at \$811,400, of which \$221,400
11 was attributed to two modular homes, including the family home, where the petitioner/husband
12 continues to reside, rent free. The L.L.C. paid and continues to pay the property taxes, insurance,
13 and utilities for this residence as part of the petitioner's employment with the L.L.C., as well as his
14 health and dental insurance, and telephone.
15

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17
18 3. The Respondent/Wife's Work History.

19 a. Prior to 1995, the respondent worked at Costco as a manager in training in
20 Anchorage, Alaska for more than two years. She earned more than \$34,000 per year plus benefits.
21 In 1995 she was transferred to the East Wenatchee Costco, and took a reduction in pay and position.
22 Between 2000 and 2006, the respondent had intermittent low back problems that resulted in time off
23 work. Eventually she qualified for Social Security disability which terminated in June 2008. When
24 she returned to Costco full time, she worked in stocking and food-produce department at the
25 Woodinville Costco. Because her son was employed at the East Wenatchee Costco, company policy
26 would not allow her to return to her former place of employment.
27
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1 b. Respondent also had an in-home business called Creative Memories during the
2 marriage. Since 2006 this business did not earn a significant net income.

3 c. The respondent salary and wage income were as follows: 2006 - \$2,932, 2007 -
4 \$9,601, 2008 - \$25,745, 2009 - \$23,600, and 2010 - \$19,143.

5 d. Since March or April 2011 the respondent has earned approximately \$2,600 per
6 month in combination with part time earnings and disability payments. As a seasonal part-time
7 Member Service Assistant at Costco, she expects that amount of income to continue until early
8 January 2012.
9

10 e. The respondent has also been attending school on-line through Ashford
11 University. She has performed exemplary by earning straight A's. She has received her AA degree
12 and hopes to complete a Bachelor's Degree in two more years.
13

14 4. Respondent Wife's Work Injury.
15

16 a. On January 11, 2009, the respondent was injured while working for Costco.
17 This injury occurred during the marriage and before separation. She has been treated regularly by
18 Dr. Julie Hodapp, a physician at Virginia Mason Clinic in Seattle.
19

20 b. After chiropractic treatments, the respondent returned to work; however, she
21 was unable to work after July 17, 2009. Since then Dr. Hodapp placed work restrictions on the
22 respondent regarding the use of her right arm, overhead weight lifting, and physical capacity. More
23 recently, she has worked periodically in temporary positions for Costco as her injury allowed.
24

25 c. As of the date of trial, respondent's injury has prevented her from returning to
26 her previous position with Costco. She is limited to lifting no more than 50 pounds to her waist, and
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1 no more than 10 pounds above her head. She also experiences vertigo if her job requires much head
2 movement.

3 d. There is no evidence that the respondent is malingering or exaggerating her
4 symptoms. Her initial injuries were to her head, neck and back. After returning to work she
5 sustained a torn rotator cuff injury due to the repetitive movements of her job.
6

7 e. The respondent's most recent doctor's visit report states:

8 "Impression: Ongoing cervical strain and rotator cuff injury with new
9 diagnosis of post concussive syndrome (vertigo), which I agree with."
10 Exhibit 9(u).

11 Respondent's most recent physical therapy report states: "Continue with treatment." Physical
12 Therapist, Doug Harris is hopeful respondent's shoulder injury will cease requiring treatment in the
13 near future.
14

15 5. Maintenance and Attorney Fees.

16 a. This court ordered temporary maintenance of \$735 per month beginning
17 January 1, 2010. The amount was reduced to \$635 per month beginning March 10, 2010.
18

19 b. By order dated July 8, 2010, the amount of unpaid maintenance was \$3,175.
20 The court ordered the petitioner/husband to pay the respondent's attorney's fees and costs of \$776
21 based on his failure to pay her maintenance. The petitioner paid \$3,951 to the respondent on or
22 before July 9, 2010. The petitioner's temporary maintenance obligation was terminated after
23 November 2010. Maintenance for August through November totals \$2,540.
24

25 c. Before trial, this court also ordered the petitioner to pay \$3,500 toward the
26 respondent's attorney's fees. This court ordered petitioner to pay an additional \$300 for
27 respondent's attorney's fees relating to the petitioner's motion for reconsideration. The court
28
29

1 ordered an additional \$500 in attorney fees for the respondent/wife after the petitioner was found in
2 contempt for failing to pay the maintenance the first two months after entry of the order.
3 Consequently, the court ordered the petitioner/husband to pay a total of \$4,300 in attorney's fees to
4 the respondent/wife.
5

6 d. The court ordered the respondent to pay the petitioner's attorney's fees as a
7 sanction for a late continuance of the trial in the amount of \$2,800. The court allowed this amount to
8 offset the amount of fees and maintenance the husband owed the wife. Therefore, as of April 20,
9 2012, the petitioner/husband still owed the respondent/wife \$4,040 ($\$2,540 + \$4,300 - \$2,800 =$
10 $\$4,040$).
11

12 6. Pre-Trial Distribution of Assets.
13

14 Before trial, the respondent sold a mobile home acquired during the marriage for \$30,000. She
15 was allowed the use of all of the proceeds. From the proceeds she paid her medical bills, moving
16 expenses, and attorney's fees, which depleted all the proceeds received from the sale.
17

18 7. Operation of Welton Orchards and Storage, L.L.C.

19 a. During 2006 and 2007, the respondent worked for the L.L.C. driving tractor,
20 pulling a sprayer, mowing, putting out coddling moth lures, "wrestling" bins and other typical
21 orchard work. She was paid for that work. In other years, she accompanied the petitioner tending
22 the wind machines and other miscellaneous duties without pay.
23

24 b. When one of the L.L.C.'s CA tenants failed to pay the rent in 2000, the L.L.C.
25 was forced to refinance to stay in business. Farm Credit required the respondent/wife to disclaim
26 any interest in the real property owned by the L.L.C. at that time before providing the financing.
27 Respondent was never asked to sign any loan documents in lieu of signing the disclaimer.
28
29

1 c. Respondent believed that signing the disclaimer would avoid her having to file
2 bankruptcy if the L.L.C. was unable to financially survive even with the loan from Farm Credit. She
3 did not receive any independent legal advice before signing the disclaimer. Respondent was
4 unaware of any potential interest she had in the L.L.C. until after the date of the separation.
5

6 d. The L.L.C. not only survived, it thrived. While Mel and Lillian Welton have
7 not been forthcoming with all of the financial records of the L.L.C., a number of the L.L.C.'s tax
8 returns were admitted into evidence. These records show the following: Total sales income for the
9 L.L.C. in 2010 was \$774,342. Taxable income was <\$115,165>. In 2010, the L.L.C. income from
10 the rental of its CA space was \$597,665. In 2010 the L.L.C.'s net rental income was \$250,452. Of
11 this amount, \$82,649 was the petitioner's share. The petitioner only received draws amounting to
12 \$42,570 that same year.
13

14 e. In 2009, the L.L.C.'s net rental income from the CA facility was \$392,648. The
15 petitioner/husband's share was \$129,574. He received draws amounting to just \$42,768 that year.
16

17 f. The income tax returns for the L.L.C. also indicate the L.L.C. has "other
18 investments" in addition to the land and improvements. No other investments were reported in the
19 years 2003-2006. In 2007, "other investments" began at \$12,587 in the beginning of the year and
20 increased to \$274,706 at the end of the year. These other investments were worth \$305,083 at the
21 beginning of 2009 and were worth \$487,599 at the end of 2010. The tax returns do not specify what
22 are these investments.
23

24 g. At the beginning of 2003, the partners' capital accounts were <\$239,182>. By
25 the end of that year they were <\$347,088>. By the end of 2004, the partners' capital accounts were -
26 \$207,083; at the end of 2005, they were <\$257,630>. At the end of 2006, they were <\$133,023>,
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1 and by the end of 2007, the partners' capital accounts had increased to \$40,518. That amount grew
2 to \$266,769 by the end of 2008/beginning of 2009. The accounts again grew from \$274,139 at the
3 end of 2009 to \$357,886 at the end of 2010. Thus, during the marriage, the partners' capital
4 accounts grew from a low of <\$347,088> to about \$270,000 in March 2009, an increase of over
5 \$600,000.
6

7 h. The petitioner/husband supervises all of the L.L.C.'s employees, including as
8 many as 50 during harvest. He worked exclusively for the orchard during the entire marriage. He
9 was on call 24/7 and worked 12-16 hours days at peak times, including the weekends. His last
10 vacation was in 2009.
11

12 i In 1999, Lillian Welton had health problems, and she stopped working for the
13 L.L.C., other than doing payroll. Mel Welton also cut back and occasionally worked in the
14 warehouse and helped during harvest. During the marriage, the petitioner/husband's job duties
15 increased over time as he took up the slack in the CA warehouse, and took over equipment
16 maintenance in addition to his duties of running the orchard.
17
18

19 j. The L.L.C. currently pays the petitioner \$2,000 per month to run the entire
20 orchard and CA warehouse operations, while his mother and father keep the books.
21 Petitioner/husband is the operations manager for the L.L.C., and his father, Mel Welton, is the
22 business manager.
23

24 k. One of the year around employees of the L.L.C., Vincente Cruz, whose
25 supervisor is the petitioner/husband earns about \$1,900 per month plus similar free housing as
26 petitioner receives. Mr. Cruz only has to pay his power and water bill. In 2009, the L.L.C. paid
27 petitioner \$3,000 per month to run the entire operation. This amount was decreased to \$2,500 per
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1 month in January 2010, then to the current \$2,000 per month. Prior to separation, petitioner and
2 respondent expected to eventually take over the operation of Welton Orchards and Storage, L.L.C.
3 when Mel and Lillian Welton retired ~~to them~~ *were no longer able to do so.* *CO*

4 8. Husband and Wife's Miscellaneous Assets.

5
6 a. Petitioner's whole life insurance policy was worth \$230 at the time of
7 separation. Petitioner owned a Harley Davidson motorcycle, but he transferred title to his brother
8 after separation and after the court used it as leverage to have the petitioner pay some of his
9 maintenance obligation. Petitioner also has about \$1,000 in other household goods, not listed on the
10 property matrix.

11
12 b. Respondent ~~has~~ *CO* own as her separate property 1351 Outlook Road, Outlook,
13 Washington, after her father passes away. Her father is 76 years old and has suffered strokes and has
14 dementia. The current assessed market value is \$148,200.

15
16 c. When the respondent and her family came to pick up her household goods from
17 the family home, the petitioner/husband was less than accommodating and unreasonable.
18 Consequently, respondent did not receive her property and incurred \$45.56 in unnecessary moving
19 expenses.
20

21
22 d. There was insufficient evidence as to the condition of the respondent's property
23 before petitioner put a portion of it in storage. Consequently, the court cannot find that there was
24 significant, measurable damage to the property when it was found in storage that could be
25 attributable to the actions of the petitioner.
26

27 9. Future Maintenance.

1 Petitioner/husband's living expenses exceed his current level of pay/draw decided upon by the
2 majority owners of the L.L.C.

3 10. Attorney Fees and Costs.

4 Because the respondent's appraiser was denied access to the property of the L.L.C., she
5 incurred \$1,701 in unnecessary expenses.
6

7 Based on the above Findings of Fact, the court reaches the following

8 CONCLUSIONS OF LAW:
9

10 A. The court concluded that RCW 26.09.080 provides in part:

11 In a proceeding for dissolution of the marriage . . . the court shall,
12 without regard to misconduct, make such disposition of the property and the
13 liabilities of the parties, either community or separate, as shall appear just and
equitable after considering all relevant factors including, but not limited to:

- 14 (1) The nature and extent of the community property;
15 (2) The nature and extent of the separate property;
16 (3) The duration of the marriage . . . ; and
17 (4) The economic circumstances of each spouse . . . at the time the
18 division of property is to become effective . . .
19

20 B. The Washington Family Law Deskbook states in part:

21 When community funds or labor are used to enhance the separate
22 property of a spouse, Washington courts may use equitable liens to increase the
23 size of the other spouse's award of community property. There are several
24 conditions to the imposition of an equitable lien:

- 25 • The claim for an equitable lien must be supported by direct
26 evidence of a contribution to the property on which the lien is
27 asserted. (citation omitted)
28 • The evidence must be more than an assertion or a claim. Some
29 decisions have emphasized the importance of documentary
evidence. (citation omitted) The evidence should be specific and

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supported by precise evidence as to the value of the contribution.
(citation omitted).

- The overall circumstances of the case must establish that it is equitable to impress a lien. *Miracle v. Miracle*, 101 Wnd.2d 137, 139 (1984)

C. Cases upholding equitable lien awards also share the following characteristics:

- The beneficiary of the equitable lien is an individual deserving of equity (e.g. the lower earner or the party with less separate property). (citation omitted).
- ...[T]he community will not be granted a lien on the increased value of a spouse's separate property business when the spouse has been paid a reasonable salary for his or her community labor invested in the business. . . [I]f the separate real property is income producing, the community's use of income from the property may negate the need for an equitable lien. (citation omitted) §30.6(1)

D. The community will not receive an equitable lien for contributions to one spouse's separate property if: (1) the contributions were a gift; (2) the community received an offsetting benefit from use of the property; or (3) the contributions were de minimis. *In re Marriage of Wakefield*, 52 Wn.App. 647(1988). §30.6(3).

E. Prior to *In re Marriage of Konzen*, (citation omitted), a number of Washington courts held that the court should award one spouse part or all of the separate property of the other spouse only in "exceptional circumstances." (citations omitted) However, the court in *Konzen* specifically discarded this rule, stating . . .

The character of the property is a relevant factor that must be considered, but it is not controlling. §32.3(2)

F. Legal Effect of Disclaimer.

1 The court further concludes that while the wife expressly disclaimed any interest in the real
2 property owned by the L.L.C. in 2000, the disclaimer did not involve the husband's ownership
3 interest in the L.L.C., only the real estate owned by the L.L.C. at the time. The disclaimer did not
4 qualify as a Community Property Agreement. The respondent/wife was not given the opportunity to
5 seek independent legal advice before signing. She was also unaware of any potential interest she
6 may have had in the L.L.C. due to the community's efforts at the time she signed the disclaimer.
7 Therefore, even if it were to be considered as a post nuptial agreement, it is not enforceable as one.
8

9
10 G. Character of Husband's Interest in Welton Orchards & Storage L.L.C.

11 The court further concludes that the husband's interest in Welton Orchards and Storage, L.L.C.
12 is his separate property as it was owned prior to marriage and his one-third percent interest in the
13 L.L.C. was the same on the date of separation.
14

15 H. The Nature and Extent of Community Property.

16 The court concludes that Exhibit 6(M) lists the community and separate property owned by the
17 parties. With the exception of the husband's interest in the L.L.C., the value of the assets owned by
18 the parties was unsubstantial.
19

20 I. Nature and Extent of Separate Property.

21
22 1. During the marriage, the husband's work efforts were devoted exclusively to the
23 L.L.C., and the husband and wife lived a modest lifestyle while the value of the L.L.C. increased
24 substantially. During the marriage the L.L.C. increased \$336,000 in value by the acquisition of
25 additional real estate, and \$305,083 in value of other investments. This \$641,083 total increase in
26 value was in large part due to the community efforts of Gene Welton's successful management of
27 the operations of the L.L.C.
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2. Furthermore, by routinely foregoing draws equal to his real estate income; that is, agreeing to be underpaid, the net capital accounts of all three owners increased substantially to about \$270,000 by March 2009 from a low of -\$347,088 at the end of 2003. This increase of over \$600,000 during the marriage, was again due in large part to the petitioner's efforts.

3. By devoting all of his time and work efforts during the marriage to running the operations of the L.L.C, petitioner and his parents enjoyed an increase in value of \$1,241,083 (the value of the additional real estate, \$336,000, gain in other assets, \$305,083, and increase in their capital accounts of over \$600,000). One third of that increase in value is \$413,694. Just the increase in the L.L.C.'S real estate, the other investments, and the current capital accounts (\$274,139) is \$915,222. One third of that amount is \$305,074.

J. Current Economic Circumstances of Each Party.

1. During the marriage, the husband worked exclusively for the L.L.C. as its operations manager and, for the sizeable orchard and CA facility worth several million dollars. The husband was grossly underpaid at the rate of \$2,000 per month during most of 2010 and 2011, exclusive of the free housing, vehicle, fuel and other expenses paid by the L.L.C. After separation he was even more grossly underpaid, barely drawing more than his employee, Vicente Cruz. The decrease in his draws at the beginning of 2010 can only be attributable to the fact his wife was requesting maintenance. No other viable explanation was offered.

2. The wife worked for the L.L.C. at times and was for the most part compensated for her work. Her primary occupation was with Costco, but due to an industrial injury, she has not yet returned to her full-time position.

1 L. The parties marriage is irretrievably broken and the court should enter a decree
2 dissolving their marriage and dividing their assets and liabilities.

3 M. The parties are awarded the community property as set forth in the attached matrix.
4 The petitioner/husband's net community property award is <\$17,395>, and the respondent/wife's net
5 community property award is \$3,853.
6

7 N. Separate Property Lien.

8 1. The primary issue in this case is whether it is a fair and equitable distribution to
9 award the petitioner all of his interest in the L.L.C., or whether the respondent should receive a
10 judgment amount and/or equitable lien against the petitioner's ownership interest in the L.L.C. As
11 noted above, even if the respondent/wife is not entitled to an equitable lien against the
12 petitioner/husband's interest in the L.L.C., she still may be entitled to an award of a portion of the
13 husband's separate property. While the wife testified that she and the petitioner dreamed of taking
14 over the business, once the petitioner/husband filed for divorce, that dream ended and the respondent
15 cannot now reasonably expect an award that would fulfill her earlier dream. However, it is
16 abundantly clear that all of the petitioner's work efforts were exclusively for the L.L.C. It is also
17 clear that as a result of the petitioner's efforts, the value of the L.L.C. was significantly enhanced.
18 The L.L.C. went from close to filing bankruptcy to now being worth over \$5,000,000 during the
19 course of the marriage. The court concludes the draws that were paid to the petitioner were
20 unreasonable considering the amount of time and effort the petitioner spent in running the operations
21 of the L.L.C. This conclusion is inescapable given the latest draw being paid to husband is
22 essentially equivalent to one of the employees who also receives free housing and other benefits.
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2. Furthermore, as a direct result of the low amount drawn by the petitioner, the financial condition of the L.L.C. has greatly improved. The L.L.C. acquired \$336,000 of additional real estate (this amount excludes the acquisition of the Stimus property in the amount of \$235,000) during the marriage. The partners' capital accounts grew by more than \$600,000 during the marriage, and the L.L.C. other investments increased by over \$300,000.

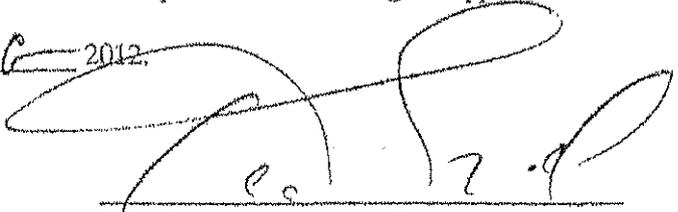
3. Supporting the award of a judgment amount and/or equitable lien against the petitioner/husband's ownership interest in the L.L.C. in favor of the respondent/wife is also equitable. Her actual earnings (excluding disability payments) are significantly less than the petitioner/husband's earnings. She is temporarily disabled. She was forced to liquidate the largest community asset to finance this litigation after the petitioner/husband repeatedly refused to pay amounts ordered by the court and exerted little, if any effort to allow access to the property and financial records for the respondent's appraiser and accountant to review.

4. While the community did receive an offsetting benefit of living on the L.L.C.'s property rent and utility free, this benefit is not enough when one considers the same benefit was provided to at least one employee and the separate estate of the petitioner/husband grew in an amount between \$305,07 and \$413,694.

5. Since the transfer ownership interest in the L.L.C. is limited by Article 9 of the Limited Liability Agreement between the petitioner and his parents, the court will not award a portion of petitioner's separate property to the respondent. Instead, a judgment will be entered against the petitioner which shall also become an equitable lien on his ownership interest in the L.L.C.

1 2. The respondent, on the other hand, sold her mobile home to acquire sufficient
2 funds to retain an accountant and an attorney to represent her in this dissolution. Despite court
3 orders to the contrary, the petitioner has failed to pay the respondent \$4,040 in maintenance and
4 attorney's fees. Petitioner shall also pay respondent \$1,746.56 for the wasted moving and appraiser
5 expenses incurred by wife due to petitioner's unreasonable conduct. Consequently, the judgment
6 against the petitioner should be increased to a total of \$180,786.56. The respondent shall also be
7 awarded an additional amount for a portion of her attorney's fees. The amount of additional
8 attorney's fees will be determined at the time of presentment. The court will review the fees
9 incurred by the respondent and what amount remains unpaid before deciding the appropriate amount.
10

11 DATED this 12th day of Aug 2012.

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T.W. SMALL, Superior Court Judge

17 Presented by:
18 LAW OFFICE OF KYLE D. FLICK, P.S.

19
20 By 
21 KYLE D. FLICK, WSBA #314963
Attorney for Respondent/Wife

22 Approved as to Form; Notice of
23 Presentation Waived by:
24 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

25
26 By _____
27 MICHAEL E. VANNIER, WSBA #30238
28 Attorney for Petitioner/Husband
29

COURT'S DISTRIBUTION

In Re the Marriage of GENE WELTON and MARINA WELTON ASSETS

Item No.	All Real & Personal property year of acquisition; all debts and adjustments	Present Possession (H/W)	Acquisition Cost	Husband's Present Value (w/o encumbrances) & proposed distribution To H To W	Wife's Present Value (w/o encumbrances) & proposed distribution To H To W	Court Distribution (H/W)
1	2002 2 Qty. Arctic Cat Snowmobiles	Husband			6,000	H 500 W 500
2	2002 - 1999 GMC Yukon SUV	Wife			4,482	5215
3	2006 Harley Davidson Motorcycle (17K-12K)	Husband			17,000	
4	Household goods to husband	Husband			4,500	5,000
5	Lights and sleeping bags	Husband			50	50
6	2000/05 Furries	Husband			200	200
7	1997 Four post decorative tent	Husband			50	50
8	2005 BBQ grill	Husband			350	350
9	2002/06 Washer/Dryer	Husband			1,500	1500
10	2000 White book cabinet unit	Husband			50	25
11	Various CD's, cassettes, videos, DVD's	Husband			500	500
12	Disney VHS collection	Husband			300	300
13	TV/VHS/DVD Comb	Husband			350	100
14	Jewelry	Husband			1,500	0
15	Jewelry	Wife			1,500	1500
16	?? Qty. folding chairs	Husband			60	60
17	Camera (new)	Husband			300	300
18	Various outside plants	Husband			500	0
19	Wife's Costco 401K	Wife			6,913	6913
20	One-third (1/3) interest in Welton Orchards	Husband			1,100,000	1,018,000
21	Honda motorcycle	Husband			2,000	0
22	2 pl. snow machine trailer	Husband			1,500	500

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1,022,000 S 0.5
GM

Exhibit no. 6m
Cause No. 09-31594
Date 12-8-11
Admitted WPS
Pet Resp
Plf Delt

Item No.	All Real & Personal property year of acquisition; all debts and adjustments	Present Possession (H/W)	Acquisition Cost	Husband's Present Value (w/o encumbrances) & proposed distribution To H	Wife's Present Value (w/o encumbrances) & proposed distribution To H	Court Distribution (H/W)
23	1995 Artic Cat snowmobile	Husband			2,000	2,000
24	Bedroom set (complete)	Husband			1,700	1,700
25	Futon	Husband			75	75
26	Dining Room table (oak)	Husband			150	150
27	Christmas Decorations obtained during marriage	Husband			2,000	300
28	Modular Home				(300,000)	30,000
29	Marine Mechanics Business Equipment				840,250	316,080
30	H's Life Insurance					230

2,276.34,335.5

RCW 4.12.040

Prejudice of judge, transfer to another department, visiting judge — Change of venue generally, criminal cases.

(1) No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the superior court designated by the chief justice of the supreme court. Upon receipt the clerk of said superior court shall transmit the forwarded affidavit to the presiding judge who shall direct a visiting judge to hear and try such action as soon as convenient and practical.

(2) The presiding judge in judicial districts where there is more than one judge, or the presiding judge of judicial districts where there is only one judge, may send a case for trial to another court if the convenience of witnesses or the ends of justice will not be interfered with by such a course and the action is of such a character that a change of venue may be ordered: PROVIDED, That in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his or her right to a trial by a jury of the county in which the offense is alleged to have been committed.

(3) This section does not apply to water right adjudications filed under chapter 90.03 or 90.44 RCW. Disqualification of judges in water right adjudications is governed by RCW 90.03.620.

[2009 c 332 § 19; 1989 c 15 § 1; 1961 c 303 § 1; 1927 c 145 § 1; 1911 c 121 § 1; RRS § 209-1.]

RCW 4.12.050

Affidavit of prejudice.

(1) Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: AND PROVIDED FURTHER, That notwithstanding the filing of such motion and affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

(2) This section does not apply to water right adjudications filed under chapter 90.03 or 90.44 RCW. Disqualification of judges in water right adjudications is governed by RCW 90.03.620.

[2009 c 332 § 20; 1941 c 148 § 1; 1927 c 145 § 2; 1911 c 121 § 2; Rem. Supp. 1941 § 209-2.]

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.

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

RCW 26.09.140

Payment of costs, attorneys' fees, etc.

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

[2011 c 336 § 690; 1973 1st ex.s. c 157 § 14.]