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COURT OF APPEALS
DISTRICT OF
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

NO. 344185

IN RE:

JULIE ANN CLARK,

PETITIONER

AND

DARRYL G. CLARK

APPELLANT

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in imputing income to Mr. Clark in the amount of \$50,000.00, net, per year at the time of trial and imputing income to Mr. Clark in the amount of \$60,000.00, net, per year if Mr. Clark was not employed within six months of the court's ruling.
2. The trial court erred in its determination of Mr. Clark's child support obligation based on the error in imputation.
3. The trial court erred in ordering Mr. Clark to pay 32% of the postsecondary educational support expenses for the son of the parties and further erred in not ordering Mrs. Clark to pay postsecondary educational support expenses for the son of the parties.
4. The trial court erred in denying Mr. Clark's request for spousal maintenance.
5. The trial court erred in allowing testimony regarding issues of fault and in considering issues of fault in ordering the division of property and in denying Mr. Clark's request for spousal maintenance.

6. The trial court erred when it denied Mr. Clark's request to allow a witness to testify regarding an offer to purchase the business owned by the parties and when it denied admissibility of documentation regarding the offer to purchase.
7. The trial court erred when it ordered a division of property that was neither just nor equitable.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in concluding that Mr. Clark's annual net income was \$50,000.00 at the time of trial and \$60,000.00 six months from the entry of the court's ruling, should he not be employed by that time.
2. Whether the trial court erred when it based Mr. Clark's child support obligation on an erroneous imputation of income.
3. Whether the trial court erred when it ordered Mr. Clark to pay 32% of post-secondary educational expenses to the petitioner, when it failed to order Mrs. Clark to pay post-secondary educational expenses, when it failed to apportion the obligation for

postsecondary educational support consistent with the apportionment of the parties incomes and when it failed to account for any resources and obligations of the child.

4. Whether the trial court erred when it determined that spousal maintenance should not be ordered.
5. Whether the trial court erred when it allowed the introduction of fault-based testimony and argument prior to determining whether or not spousal maintenance should be ordered and how property and debt should be divided.
6. Whether the trial court erred when it denied Mr. Clark's request to admit testimony and evidence regarding an offer to purchase the parties' veterinary practice.
7. Whether the trial court erred in its determination of a just and equitable division of property.

STATEMENT OF THE CASE

Mr. and Dr. Clark were married on July 29, 1989. **(RP 713, lines 16-17)** They separated on February 5, 2014. **(RP 713, lines 17-18)** At the time of trial, the parties had one minor child, Jessica, age 12, and a 18-

year-old son, Carson. **(RP 713, lines 23-24)** Dr. Clark was 54 years old at the time of trial and Mr. Clark was 53 years old at the time of trial. **(RP 714, 4-5)**

Both parties received undergraduate degrees from Washington State University prior to marriage. **(RP 714, lines 6-7)** Dr. Clark began a graduate degree in veterinary medicine prior to the parties marriage and completed the degree after the parties marriage. **(RP 715, 5-14)** Mr. Clark's degree is in hotel and restaurant management. **(RP 714, lines 8-9)**

In the early years of the parties marriage, the parties lived in Las Vegas, Nevada. Mr. Clark worked in the hotel industry while Dr. Clark worked as a veterinarian. **(RP 715, lines 11-14)**

The parties the made a decision to leave Las Vegas, Nevada and relocate to Spokane, Washington to allow Dr. Clark to pursue her career as a veterinarian. **(RP 434, lines 10-15)** The parties opened a veterinary clinic in a rented space while living with Dr. Clark's parents. **(RP 715, lines 20-25)** Both Dr. Clark and Mr. Clark worked at the veterinary clinic. **(RP 715, lines 20-22)**

In 2007, the parties completed construction on a building and

moved their veterinary practice into the building in 2008. **(RP 436, lines 2-14)** Title to the building was held by an LLC known as Carica which rented space to the veterinary practice. **(RP 716, lines 3-8)**

Over time Dr. Clark's work as a veterinarian decreased as she stayed at home with the parties' children. **(RP 437, lines 15-24)** Prior to the parties separation, Dr. Clark had worked part-time at the practice for a period of years. **(RP 437, lines 15-24)** Dr. Clark testified at trial that she worked 20 hours per week at the practice. **(RP 445, lines 9-13)** Mr. Clark testified that Dr. Clark worked less, approximately 1.5 days per week. **(RP 533, lines 1-25; RP 534, lines 1-24)**

Mr. Clark was employed by the practice as the office manager. He had total responsibility for the business side of the practice, including the hiring and firing of personnel, accounts receivable and accounts payable, inventory management, etc. **(RP 435, lines 17-25; RP 436, lines 1-25; RP 437, lines 1-14)** Mr. Clark testified that he worked at least 35 hours per week at the practice. **(RP 536, lines 16-24)**

In 2004, the parties also opened a coffee shop, which rented space from the LLC. **(RP 716, lines 9-11)** Mr. Clark testified he was the sole

party involved in the operation of the coffee shop; that he arranged for financing for the project, worked with the builder and hired the employees. **(RP 575, lines 21-25; RP 576, lines 1-4)**

After the parties separation in February 2014, Dr. Clark became more involved in the operation of the veterinary clinic. **(RP 717, lines 12-13)** Dr. Clark testified that she spent a significant number of non-billable hours learning the computer system, familiarizing herself with case files and coming up to speed on the management of the veterinary practice. **(RP 717, lines 13-24)** Dr. Clark unilaterally terminated Mr. Clark as an employee of the practice in June 2014. **(RP 717, lines 11-12)** Since that time, Dr. Clark ran the veterinary practice exclusively. **(RP 717, lines 12-13)** Mr. Clark ran the coffee shop exclusively. **(RP 136, lines 13-15)**

Testimony at trial established that the practice value was only slightly higher in 2014 than it was at the end of 2013. **(RP 408, lines 21-25)**. Each party hired an expert to value the practice. Dr. Clark's expert arrived at a value of \$241,000.00. Mr. Clark's expert arrived at a value of \$406,000.00. **(RP 724, lines 17-20)**

On the Friday prior to the trial date, Mr. Clark's attorney added a

new witness to his witness list. **(RP 264, lines 14-23)** The witness was being offered to testify about the witness's very recent offer to purchase the veterinary practice. **(RP 264, lines 14-23)** The testimony of this witness was excluded at trial, along with the proposed exhibit regarding the offer to purchase the practice. **(RP 268, lines 11-26; RP 269, lines 1-4)**

At trial, both experts also testified about the compensation figures for a veterinary clinic manager each used in their valuations. Dr. Clark's expert testified that reasonable compensation for a practice manager varied between \$48,000.00 and \$60,000.00. **(RP 735, lines 10-12)** Mr. Clark's expert testified that reasonable compensation varied between \$16.00 and \$18.00 per hour. **(RP 328, lines 14-22)** Dr. Clark's expert based his testimony on conversations with other veterinary clinic managers. **(RP 735, lines 10-12)** Mr. Clark's expert based his testimony on the statements of Dr. Clark herself. **(RP 328, lines 14-22)** Both experts agreed on the reasonable compensation figure for Dr. Clark. **(RP 324, lines 17-25)**

Dr. Clark testified at trial that her monthly expenses totaled \$8,773.00. **(RP 498, lines 11-13)** Mr. Clark testified that his household

expenses totaled \$2,755.00 per month. **(RP 566, lines 9-10)** The parties had a comfortable style of living during their 24.5 years of marriage. **(RP 736, lines 12-14)**

Both parties testified to a desire to keep the veterinary practice and buy out the other party. Dr. Clark asked that for division of property purposes, the practice be valued as determined by her expert. **(RP 154, lines 2-9)** Mr. Clark offered to use a value of \$500,000.00, exceeding the value determined by his own expert. **(RP 590, lines 4-21)**

Dr. Clark testified that Mr. Clark removed \$11,500.00 from the Carica LLC account post-separation. **(RP 477, lines 10-19)** Mr. Clark testified that he did remove those funds but that there remained a balance in the account after his removal. **(RP 671, lines 5-8)** Mr. Clark also testified that he removed the funds to pay for attorneys fees as allowed under the court's temporary order. **(RP 558, lines 9-25; RP 559, lines 1-25)**

Dr. Clark testified that an employee of the veterinary practice embezzled funds in the amount of \$25,000.00 prior to the separation and that Mr. Clark failed to follow through in prosecuting the individual. **(RP 101, lines 18-25; RP 102; lines 1-25; RP 103; lines 1-22)** Dr. Clark did

admit that Mr. Clark was crucial in under-covering the embezzlement through the use of hidden cameras. **(RP 102, lines 14-16)** Dr. Clark testified that the parties insurance coverage resulted in \$25,000.00 being paid to the parties post-separation and that the funds were deposited into the corporate account. **(RP 103, lines 6-23)**

Over the objection of Mr. Clark's attorney, Dr. Clark was allowed to testify as to an extra-marital affair between Mr. Clark and another veterinarian employed by the parties' veterinary practice. The trial court allowed the testimony pursuant to Dr. Clark's attorneys argument that it related not to fault but rather to the waste of community assets and a breach of fiduciary duty on the part of Mr. Clark. **(RP 56, lines 11-25; RP 57, lines 1-25; RP 58, lines 1-25)** Throughout the trial, numerous questions were asked and references made to Mr. Clark's "girlfriend" and the timing of their relationship.

As part of her waste argument, Dr. Clark alleged the following:

1. Mr. Clark deposited community money into the bank account of the woman repeatedly identified as his girlfriend by Dr. Clark and her counsel.; **(RP 74, lines 12-24)**

2. That Mr. Clark spent an undisclosed amount of money on

hotel rooms related to his extra-marital activity.; **(RP 75, lines 1-9)**

3. That Mr. Clark awarded an inappropriate bonus in the amount of \$2,000.00 to this individual, as well as vacation hours Dr. Clark alleged were not earned; **(RP 64, lines 4-25; RP 65, lines 1-25; RP 66, lines 1-25; RP 67, lines 1-25)**

4. That Mr. Clark exposed the community to a potential lawsuit by engaging in an extra-marital affair with an employee; **(RP 61, lines 21-24);** and

5. That the 2013 federal income taxes were not paid until 2014. **(RP 104, lines 8-21)**

In response to the fault-based argument, the following testimony was submitted and/or findings made by the trial court:

A. Mr. Clark did deposit \$1,250.00 into the bank account of the veterinarian in question.; **(RP 632, 4-10)**

B. Mr. Clark incurred hotel expenses but he was not questioned as to whether or not the amount was insignificant.; **(RP 634, lines 15-20)**

C. That the vacation hours paid by Dr. Clark to the employee

in question were earned by her and calculated as part of the payroll system over the course of her employment and that Mr. Clark discussed with Dr. Clark paying a \$2,000.00 bonus to the employee because the clinic did not offer retirement benefits.; **(RP 552, lines 18-25; RP 553, lines 1-5)**

D. No lawsuits from the former employee had been filed and the issue remained only a contingent liability at the time of trial. **(RP 731, lines 3-4)** .; and

E. Mr. Clark testified as to his belief that the 2013 federal income taxes were later paid from community funds. **(RP 636, lines 6018)**

The above constituted the entirety of the waste argument that served as the basis for the fault testimony offered by Dr. Clark.

Mr. Clark testified about his lack of income and inability to support himself. **(RP 582, lines 11-21)** He further testified about his job search efforts, which he admitted may not have been as vigorous as they should have been. **(RP 613, lines 5-7)**. Mr. Clark also offered to pay spousal maintenance to Dr. Clark in the event the practice was awarded to him and

he had that income to rely upon. **(RP 589, lines 16-21)**

At the conclusion of trial, the court determined that the only equitable approach was to award the LLC, the veterinary practice and the coffee shop to one party and order an equalization payment to the other party. **(RP 718, lines 22-25)** Despite the undisputed testimony that Mr. Clark had been far more involved in the practice than Dr. Clark, the trial court concluded that Dr. Clark should be awarded the LLC, the veterinary practice and the coffee shop because she was the licensed veterinarian. **(RP 1-6)** After valuing the assets, the trial court ordered an equalization payment to Mr. Clark in the amount of \$103,854.50. **(RP732, lines 1-8)** In valuing the business, the court used a value similar to that offered by Dr. Clark's expert. **(RP 726, lines 15-21)** The trial court also used the methodology for payment of any equalization as proposed by Dr. Clark, with payments made over time, at the rate of \$3,000.00 per month. **(RP 732, lines 6-8)** The family home which was awarded to Dr. Clark, was to serve as security for the equalization payment despite the trial court's determination that the net equity in the home was only \$8,130.00. **(RP 727, lines 5-13)** In valuing the home, the trial court used the value offered

by Dr. Clark. **(RP 727, lines 5-8)**

In its findings and conclusions regarding liabilities, the trial court adopted the proposals of Dr. Clark and credited her with paying the \$10,237 in accumulated vacation leave for the dismissed employee, the \$2,000.00 paid as a bonus to that employee and the 2013 IRS personal taxes paid by community funds, thereby reducing the amount of the equalization payment owed to Mr. Clark. **(RP 730, lines 3-10)**

In determining incomes, the trial court adopted a \$12,000.00 net income figure for Dr. Clark and then imputed Mr. Clark at the income level proposed by Dr. Clark. **(RP 741, lines 22-25; RP 742, lines 1-11 and lines 19-22)** The trial court went on to increase the imputation of income to Mr. Clark if he remained unemployed after six months. **(RP 742, lines 507)** In reaching its conclusion, the trial court cited to the income drawn by Mr. Clark during the parties marriage despite the testimony of both experts that it exceeded the reasonable compensation for a person in that position. **(RP 741, lines 14-18)** Further, the trial court made specific findings that none of the factors considered in the hierarchy

of imputation applied to Mr. Clark, except the median net monthly income figures. **(RP 741, lines 1-13)** The trial court then based its determination of child support on the imputation to Mr. Clark as discussed above.

Regarding post-secondary educational support, the trial court then ordered Mr. Clark to pay a percentage of the college expenses that exceeded his share of the combined incomes of the parties. The trial court further ordered the payments to be made to Dr. Clark until such time as circumstances changed, at which time Mr. Clark could seek a review of "his" post-secondary obligation. No post-secondary obligation was set for Dr. Clark. Further, none of the statutory factors regarding post-secondary educational support were applied. **(RP 742, 23-25; RP 743 1-25; RP 744, 1-7)**

Regarding spousal maintenance, the trial court concluded that Mr. Clark had received one year of spousal maintenance during the pendency of the action and that no further spousal maintenance should be ordered. **(RP 738, lines 1-12)** The trial court terminated the award of spousal maintenance and then credited an overpayment caused by the termination date against the equalization payment owed by Dr. Clark to Mr. Clark. **(RP**

738, lines 1-12) In making its determination that Mr. Clark did not have a need for spousal maintenance, the trial court found that Mr. Clark had the ability to open another veterinary practice with another veterinarian or engage in other employment with an income similar to that he was paid during the marriage. (RP 735, lines 20-25)

STANDARDS OF REVIEW

Although a trial court has broad discretion when determining a division of property, a request for an award of spousal maintenance and determinations of child support in a marriage dissolution action, the trial court's decision is reviewable for an abuse of discretion. In re Marriage of Rockwell, 141 Wn. App. 235 (2007). A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. In re Marriage of Crump, 175 Wn. App. 1045 (2013). As set forth in In re Jannot, 110 Wn. App. 16, 22, affirmed in part, 149 Wn.2d 123 (2002):

The abuse of discretion standard is not, of course unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupportable, factually. On the other

end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.

And as stated in In re Marriage of Littlefield, 133 Wn.2d 39, 47 (1997),

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

The trial court's challenged findings are reviewed for a determination of whether there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the premise is true. In re Marriage of Griswold, 112 Wn. App. 333 (2002).

ARGUMENT

The trial court erred in its determination of child support

RCW 26.19.071(6) requires the court to impute income to a parent when that parent is voluntarily unemployed or voluntarily underemployed. The determination of voluntarily underemployment or voluntary

unemployment is to be based on a consideration of that parent's work history, education, health, age and any other relevant factors. "The usual and ordinary meaning of 'voluntary unemployment' then is that the unemployment is brought about by one's own free choice and is intentional rather than accidental." In re Marriage of Blickenstaff, 71 Wn. App 489 (1993). In imputing income to an unemployed parent, the court does not have to make a finding that the parent is purposefully unemployed in order to avoid a child support obligation. In re Marriage of Didier, 134 Wn. App. 490 (2006).

RCW 26.19.071(6) further provides that in the absence of records of a parent's actual earnings, the court shall impute income to a parent in the following order of priority:

- (a) **Full-time earnings at the current rate of pay;**
- (b) **Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;**
- (c) **Full-time earnings at a past rate of pay where information is incomplete or sporadic;**

- (d) **Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;**
- (e) **Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.**

In the present case, the trial court imputed income to Mr. Clark based on his unemployment at the time of trial and in consideration of his work history, education, health, age and relevant factors. In making its findings regarding imputation, the trial court found that the factors in **RCW 26.19.071(a) through (d)** did not apply. **(RP 751, lines 1-13)** Having made the determination that the first four factors in the hierarchy of imputation did not apply, the trial court was left with adopting the

median net monthly income for a person of Mr. Clark's age. Mr. Clark was 53 years old at the time of trial. **(RP 714, lines 4-5)** According to the most recent Washington State Child Support Schedule for Worksheets published by the Administrative Office of the Courts, the median income for a person age 53 is \$3,569.00 per month, net.

The trial court imputed Mr. Clark at a net monthly income of \$4,166.67 as of the date of trial and further increased the imputation to \$5,000.00 per month, net, should Mr. Clark not be employed within six months of the trial date. **(RP 742, lines 8-10)** In making its determination of imputation, the trial court further referenced the previous W-2 income of Mr. Clark while he was employed by the veterinary clinic owned by the parties. **(RP 741, lines 14-18)** This was in spite of the determination by both experts that the reasonable income figure for a manager of a veterinary clinic was significantly less than what Mr. Clark was paid as the manager of the family business. **RP 735, lines 10-12; RP 328, lines 14-22)**

In making its findings and conclusions regarding imputation, the trial court did not find or conclude that Mr. Clark was unemployed or

underemployed for purposes of avoiding a child support obligation. Further, the trial court offered no reasons why it chose to not apply the census bureau figures set forth in the hierarchy of imputation, despite finding that the remaining bases for determination within the hierarchy were not applicable in this case.

The trial court's determination regarding the imputation of income to Mr. Clark was an abuse of discretion.

The trial court erred in its determination of post-secondary educational support

The trial court had the authority to order postsecondary educational support for the parties son, Carson, pursuant to **RCW 26.19.090**. In determining the amount of postsecondary educational support to be ordered, the child support schedule is advisory, not mandatory. **In re Marriage of Daubert**, 124 Wn. App 483 (2004). Further, the Daubert court also held that the amount ordered must be apportioned according to the net income of the parents as determined in RCW 26.09. **In re Marriage of Daubert**, at 505.

After determining that postsecondary educational support should be ordered, the trial court ruled as follows:

The Court finds that secondary support should be ordered. The Court accepts Dr. Clark's recommendation that Mr. Clark contribute 32 percent of books and tuition and college fees. The Court also finds that Mr. Clark should pay 32 percent of Carson's room and board costs at home. In effect, a third of this is being left to Carson.

Based on the income determinations made by the trial court, Mr. Clark's net monthly income was 25.8% of the combined monthly net incomes of the parties. (Rising to 29.4% should his net monthly income imputation be increased to \$5,000.00 per month.). The Court also heard testimony at trial that the parties' son would be attending Eastern Washington University and that the cost for room and board at Eastern Washington University was a total of \$9,628.00 per year. Tuition was estimated at \$7,972.00 per year. **(RP 28, lines 12-25)**. The trial court also made a finding regarding existence of college accounts established by the parties to assist in funding their children's college educations. **(RP 729, lines 18-20)**

Regarding room and board, the trial court subsequently entered an Order of Child Support that required Mr. Clark to pay a transfer payment of \$418.35 for Carson to Dr. Clark. The order further requires Mr. Clark to pay his 32% of books, tuition and fees to Dr. Clark, subject to a review

at a later date should Carson no longer reside with Dr. Carson.

Although the trial court stated "In effect, a third of this is being left to Carson", the trial court did not establish what percentage of the total cost of tuition, room, board, books and fees were to be divided between the parties in any detail. **(RP 744, line 4)** Assuming the ruling does limit the parties combined obligation to 2/3rds of the total cost of \$17,600.00, the combined obligation of the parties would be \$6,450.76 for room and board and \$5,341.24 for tuition.

However, the trial court's order only sets an obligation for Mr. Clark. Neither the ruling nor the order requires Dr. Clark to pay anything towards the postsecondary obligation of Carson. Further, Dr. Clark is required to pay more than the trial court had the authority to order pursuant to **In re Marriage of Daubert**. For example, Mr. Clark's obligation for room and board should have been limited to 25.8% of \$6,450.76, or \$138.69 per month. Instead, the trial court ordered Mr. Clark to pay \$418.35 per month for room and board directly to Dr. Clark.

Additionally, Mr. Clark's obligation for tuition should have been limited to 32% of the total obligation allocated to the parties, which

appears to 2/3rds of the tuition expense. Instead, Mr. Clark was ordered to pay 32% of the total expense and Dr. Clark was not ordered to pay anything. Assuming a 2/3rds allocation to the parties. Mr. Clark's obligation for tuition should have been limited to 25.8% of \$5,341.24.

The trial court abused its discretion when it ordered Mr. Clark to pay more than his proportionate share of postsecondary educational support expenses and when it did not order Dr. Clark to pay any portion of the postsecondary educational support expenses.

The trial court erred in denying Mr. Clark's request for spousal maintenance

An award of spousal maintenance is within the discretion of the trial court. **In re Marriage of Bulicek**, 59. Wn. App. 630 (1990). An award of spousal maintenance is not a matter of right. **In re Marriage of Luckey**, 73 Wn. App 201 (1994). However, appellate courts have determined that in long-term marriages, the objective of the trial court should be to equalize the financial positions of the parties for a significant period of time. **In Re Marriage of Rockwell**, 141 Wn. App 235 (2007), (referring to marriages of 25 years of more). The nonexclusive statutory

factors considered by the court are set forth in **RCW 26.09.090**.

In the present case, the trial court found that the parties lived a comfortable lifestyle, although their assets were encumbered by debt. **(RP 736, lines 11-14)** The trial court found that Dr. Clark had an actual net income of \$12,000.00 per month, generated from her work at the veterinary clinic opened and operated during the marriage. **(RP 740, lines 23-25)** The trial court found that Mr. Clark had no net income at the time of trial but an ability to find employment in the future. **(RP 735, lines 1-25; RP 736, lines 1-10)** Dr. Clark testified that based on the standard of living established during the marriage, her household expenses totaled \$8,773.00 per month. **(RP 498, lines 11-13)** Mr. Clark testified that he had limited his household expenses to a modest amount of \$2,755.00 per month, despite the parties standard of living during the marriage. **(RP 566, lines 9-10)** At the time of trial, Mr. Clark did not have an ability to meet his needs independently and was receiving spousal maintenance from Dr. Clark.

Based on his work as the manager of the parties' veterinary clinic during the marriage, the trial court concluded that Mr. Clark had the ability

to open another veterinary clinic with another veterinarian or to transfer the skills he learned to other businesses. **(RP 735, lines 1-25)** The trial court also found that Mr. Clark could engage in other business activities such as serving as a pilot car driver. **(RP 735, lines 1-25)** No testimony was offered regarding the amount of income Mr. Clark could earn driving a pilot car vehicle.

The trial court did not take into consideration the fact that Mr. Clark has a college degree in hotel and restaurant management that he has not used since the parties decision to put Dr. Clark's career goals ahead of Mr. Clark's. Nor did the trial court take into consideration that the only employment Mr. Clark has had as a veterinary clinic manager was with the veterinary clinic owned by the parties, from which he was fired by Dr. Clark. The trial court also did not make any findings related to the fact that in applying for other future positions, Mr. Clark would have to list Dr. Clark as his previous employer and indicate that he was terminated from that position. No testimony was offered as to what sort of reference Dr. Clark would provide should she be contacted by a prospective employer.

Although the trial court made a finding that the parties had been

married 24.5 years, the trial court did not address whether or not it was appropriate to consider equalizing the incomes and resources of the parties for any significant period of time. Given the ruling in **In re Marriage of Rockwell**, that trial courts should consider equalizing the parties circumstances for life when deciding marriages lasting only six months longer than the marriage in this matter, such an analysis would have been appropriate.

The effect of the trial court's ruling was to award all of the income-producing property to Dr. Clark and none of the income-producing property to Mr. Clark. Mr. Clark, who had already been unilaterally terminated by Dr. Clark, was left in the position of starting over after 24.5 years. Further, given the level of income produced by the clinic at which Mr. Clark had worked significantly more hours than Dr. Clark, Dr. Clark was left in the position of being able to generate an income that allows her to maintain the standard of living established during the marriage.

In its analysis, the trial court specifically commented that Mr. Clark would have available to him the \$3,000.00 per month equalization payment ordered by the trial court as part of its division of property. In essence, the trial court considered that Mr. Clark could use his share of the

community property to pay for his financial support. In **In re Marriage of Stenshoel**, 72 Wn. App. 800 (1994), the trial court considered the property equalization payment received by the wife as income to her for purposes of calculating child support. The appellate court concluded as follows:

Furthermore, we believe that under the circumstances presented here, considering the payments as income or benefits contravenes the principles behind the community property system . . . By considering the payments as income to Peggy and deducting them from Paul's income the trial court substantially reduced the value of Peggy's share of the property, thereby undermining the fairness of the distribution. We believe that it is inequitable to require Peggy to unilaterally exhaust her share of the community business to support the children. In re Marriage of Stenshoel, at 805.

The same rationale applies in the present case. Mr. Clark was awarded an equalization payment representing his portion of the parties community property. The trial court's ruling leaves Mr. Clark in the position of having to use that equalization payment to provide for his financial support, thereby greatly undermining any fairness in the distribution ordered by the court.

Unlike in other cases, it cannot even be said that Mr. Clark

benefited from the increased earning capacity of Dr. Clark to the extent that an award of maintenance would not be appropriate. Although Dr. Clark completed her veterinary degree during the parties marriage, it was the efforts of Mr. Clark, not Dr. Clark, that resulted in a veterinary practice that generated the significant income that Dr. Clark now enjoys. It was Mr. Clark that worked at the practice on a daily basis as the practice manager, employing and supervising other veterinarians and employees, while Dr. Clark reduced her involvement in the clinic over time until she was scheduled only one day per week and, according to Mr. Clark, worked not more than 1.5 days per week. **(RP 435, lines 17-25; RP 436, lines 1-25; RP 437, lines 1-14; RP 533, lines 1-25; RP 534, lines 1-24)**

Testimony further established that Dr. Clark had the ability to pay a reasonable amount of spousal maintenance. The trial court concluded that Dr. Clark had a monthly net income of \$12,000.00 per month and household expenses, without any adjustments, of under \$9,000.00 per month.

Lastly, the trial court referenced the time that Mr. Clark has had to find employment as of the date of trial. Mr. Clark was terminated

unilaterally by Dr. Clark in June 2014. (RP 738, 1-7) Trial in this matter took place in July 2015. During the period between his termination and trial, Mr. Clark testified that he had looked for other work. (RP 560, lines 18-25; RP 561, lines 1-25; RP 562, lines 1-25; RP 563, lines 1-25; RP 564, lines 1-16). However it is not unreasonable to expect that that he was also hampered by the fact that no decision had been made regarding to which party the business would be awarded. Until that determination was made, Mr. Clark would not know which direction he needed to take; prepare to return to the business to which he had dedicated most of his adult working life or search for another career. Given the length of the marriage and the length of his involvement in the business, it was unreasonable to expect that Mr. Clark would be self-supporting at the time of trial. Further, although the trial court placed great emphasis on Mr. Clark's need to become self-supporting, the issue of self-support is only one factor to be considered. Bulicek v. Bulicek, 59 Wn. App. 630 (1990).

Although the award of maintenance is discretionary, the amount and duration of any award must be just. Bulicek at 633. Further, the trial court must make the post-dissolution economic position of the parties the

paramount concern. **Bulicek** at 635. The trial court's conclusion that spousal maintenance should terminate November 2015 was not just and was an abuse of discretion.

The trial court erred in allowing testimony of, and in considering, issues of fault

In making a determination regarding the division of property and debt, as well as determinations regarding requests for spousal maintenance, the trial court is prohibited from considering marital misconduct. **RCW 26.09.080** and **RCW 26.09.090**. Marital misconduct the trial court may not consider has been defined as immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence, squandering of marital assets or such behavior as unnecessarily incurring tax liabilities. **In re Marriage of Steadman**, 63 Wn. App 523 (1991). In other words, it has been defined as "negatively productive conduct." **In re Marriage of Clark**, 13 Wn. App 805 (1975).

In the present case, Dr. Clark introduced testimony of an extra-marital relationship between Mr. Clark and another veterinarian employed

by the veterinary clinic owned by the parties, over the objection of Mr. Clark at trial. Dr. Clark's counsel argued that the testimony was offered not for purposes of establishing fault but for purposes of establishing waste of community assets of the parties veterinary practice and a breach of fiduciary duty regarding the veterinary practice. **(RP 56, lines 1-25; RP 57, lines 1-25; RP 58, lines 1-25)** Throughout the trial, Dr. Clark referred to Mr. Clark's affair and referred to the individual as his "girlfriend".

The allegations of waste made by Dr. Clark were not supported by the evidence and did not warrant repeated questions and answers regarding the nature and extent of Mr. Clark's affair. For example, Dr. Clark alleged that Mr. Clark spent community funds on hotel rooms while engaging in the affair and Mr. Clark admitted to the same. **(RP 75, lines 1-9; RP 634, lines 15-20)** However, no testimony was offered regarding the amount of money spent nor was any evidence admitted to establish that the funds used came from the veterinary practice account. So little testimony was offered that the trial court made no determinations regarding this issue. After raising the issue in testimony, no effort was made by Dr. Clark to establish gross fiscal improvidence or squandering of marital assets to the

degree necessary to allow for the introduction of fault-based issues.

Dr. Clark further alleged that Mr. Clark inappropriately gave vacation credits and awarded a \$2,000.00 bonus to the employee with whom he had an affair. She further testified that when she terminated the employee, she paid out the accumulated vacation credits and the \$2,000.00 bonus to the employee. Dr. Clark alleged that these benefits were paid to the employee as a result of her affair with Mr. Clark. **(RP 64, lines 4-25; RP 65, lines 1-25; RP 66, lines 1-25; RP 67, lines 1-25)** However, Mr. Clark, who was the sole financial operator of the business, testified that the vacation credits were accumulated over time as part of the payroll system and based on the employment agreement with the employee. **(RP 552, lines 18-25)** Mr. Clark further testified that the bonus was discussed with Dr. Clark and was offered because the clinic did not provide retirement benefits. **(RP 553, lines 1-5)** Dr. Clark offered no other testimony or evidence to dispute the testimony of Mr. Clark, the clinic's sole business manager at the time. Further, she admitted on cross-examination that Mr. Clark would have been in a better position to know if the employee had accumulated vacation time, given his role in the business. **(RP 483, lines 20-24)** Dr. Clark then proposed that the funds

paid out be considered a community expense and placed on her side of the asset/liability distribution ledger, which resulted in each party sharing one-half the expense, thereby seeming to confirm the testimony of Mr. Clark. These allegations were not supported by the evidence and were offered as a means to allow for the introduction of testimony on the issue of fault.

Dr. Clark then argued that Mr. Clark exposed the business to a potential lawsuit by engaging in an affair with an employee and thereby again was able to testify about the existence of the affair. **(RP 61, lines 21-24)** However, no such lawsuit was ever threatened or filed prior to trial and was referred to by the trial court as only a contingent liability. **(RP 731, lines 3-4)**

Lastly, Dr. Clark argued that Mr. Clark deposited funds into an account in the name of the employee with whom he had an affair. **(RP 74, lines 12-24)** Mr. Clark testified that \$1,250.00 was deposited into her account. **(RP 632, lines 4-10)** Given the value of the community estate and the income of the clinic business, the amount of \$1,250.00 cannot be characterized as gross fiscal improvidence or squandering of marital assets.

The existence of an extra-marital affair is not admissible unless it can lead to a determination of negatively productive conduct as described in prior case-law. Although Dr. Clark testified repeatedly about the affair and Mr. Clark was cross-examined about the affair, over the objections of counsel, no effort was made to tie the relationship to such negatively productive conduct that would give rise to a finding of waste.

It is Mr. Clark's belief that the inclusion of testimony regarding fault led the trial court to reach the decisions it made regarding the division of property and the denial of an award of spousal maintenance. Although the issue of fault was not referenced itself in the trial court's decision, comments made by the trial court such as that Mr. Clark has the ability to open another veterinary clinic with another veterinarian certainly leads to the strong inference that the trial court improperly considered fault. When the trial court improperly considers marital misconduct when it divides property or determines whether maintenance should be awarded, the trial court's decision arises to an abuse of discretion. **In re Marriage of Muhammad**, 153 Wn.2d 795 (2005).

The trial court erred when it denied Mr. Clark's request to call a witness and submit documentation regarding an order to purchase the parties business

During the week prior to trial in this matter, Mr. Clark received an offer to purchase the veterinary clinic owned by the parties. Counsel for Mr. Clark provided the offer to Dr. Clark's counsel and listed the potential purchaser as a new witness. **(RP 264, lines 14-23)** At trial, Dr. Clark's expert testified that a potential offer to purchase the business could potentially impact his assessment as to the value of the business. **(RP 269, lines 16-21)** The trial judge excluded the testimony and the offer itself from trial on the basis of its disclosure the week prior to trial. **(RP 268, lines 11-26; RP 269, lines 1-4)**

It is not disputed that the potential witness and the existence of the offer were not disclosed pursuant to the timelines set forth in the trial court's case scheduling order. However, Mr. Clark's trial attorney argued that the offer had only been made the week prior to trial and it was disclosed as soon as the offer was made.

Trial court's have broad discretion on the choice of sanctions for violations of discovery rules. **Burnet v. Spokane Ambulance**, 131 Wn.2d

484 (1997). When the trial court considers one of the harsher sanctions available, the record should be clear that the trial court determined that a lesser sanction would not have sufficed. **Burnet v. Spokane Ambulance** at 494. It is an abuse of discretion for a trial court to exclude testimony as a sanction for noncompliance with orders regarding discovery unless there is a showing of intentional nondisclosure, a willful violation of a court order or other unconscionable conduct. **Burnet v. Spokane Ambulance** at 494.

In the present case, there was no showing of intentional nondisclosure, that the violation of the discovery order was willful or that there was any unconscionable conduct. In fact, counsel for Dr. Clark specifically stated that he was not alleging any such behavior. **(RP 267, line 1)** The trial court's expressed that its concern was about the issue arising after the deadlines in the discovery orders and on the eve of trial.

The result of the trial court's ruling to exclude all testimony and documents regarding an offer to purchase the business was to deny the admissibility of evidence relating to the value of the most significant asset owned by the parties. A great deal of the trial testimony focused on the value of this specific asset, with expert values that differed, (at points

during the trial), by \$300,000.00.

Although the trial court expressed its concern regarding the timing of the issue, it did not make any findings regarding intentional nondisclosure, willfulness in violating the order or unconscionable conduct on the part of Mr. Clark. As such, the decision by the trial court to exclude the witness and exhibit was an abuse of discretion.

The trial court erred when it ordered a property division that is not just nor equitable

RCW 26.09.080 sets forth the statutory factors the trial court is required to consider, without regard to marital misconduct, when dividing property in a dissolution action. "The key to an equitable distribution of property is not mathematical preciseness, but fairness." **In re Marriage of Matthews**, 70 Wn. App 116 (1993). The paramount concern of the trial court should be the economic condition in which the parties will be left upon entry of the decree. **In re Marriage of Mathews**, at 121.

In the present case, the parties owned two businesses during their marriage: the veterinary clinic and the coffee shop. Throughout the majority of the marriage, Mr. Clark was primarily involved in the

veterinary clinic and was exclusively involved in the business side of the clinic. Mr. Clark was also solely involved in starting and operating the coffee shop. **(RP 435, lines 17-25; RP 436, lines 1-25; RP 437, lines 1-14; RP 575, lines 21-25); RP 576, lines 1-4)** Both parties testified at trial that they wanted the veterinary clinic. Mr. Clark testified that he also wanted the coffee shop awarded to him.

The trial court determined that the only equitable approach was to allow one party to buy out the interest of the other party from both businesses. As the coffee shop had a value of less than \$10,000.00, the main issue was the veterinary clinic. Dr. Clark offered to base her buy-out of the clinic on a value of \$241,000.00. **(RP 724, lines 17-19)** Mr. Clark testified that he would buy out Dr. Clark from the clinic, using a value of \$500,000.00 for the clinic. **(RP 589, lines 16-25; RP 590, lines 1-19)** Dr. Clark testified that whatever equalization payment was ordered she would need to make time payments on the entire balance. Mr. Clark testified that he would be able to make a large lump sum payment to Dr. Clark, pay \$2,000.00 more per month than Dr. Clark proposed to pay him for a period of one year, and then make payments on the remaining

balance. **(RP 549, lines 10-29)** Both proposed that the land and building in which the clinic operates be awarded to each of them. (The value being exceeded by the debt against it.)

Clearly Mr. Clark's proposal offered maximum value for the one significant asset of the parties. He not only offered to pay more than two times what Dr. Clark offered to pay for the same asset, he also proposed a method of payment to Dr. Clark that was more advantageous than what she proposed to him in terms of method of payment.

Awarding the property distribution as proposed by Mr. Clark would have allowed him to continue to work at the practice as the clinic manager, employing veterinarians to work for him. Dr. Clark would receive two times what she believed her community interest in the clinic value to be and would still be employable as a veterinarian in another practice or free to open a competing practice.

The end result, however, of the trial court's division of property was to leave Dr. Clark with a business that generates a personal net income to her of \$12,000.00 per month, along with the coffee shop started and operated exclusively by Mr. Clark, while leaving him with only the

\$3,000.00 payment made by Dr. Clark each month towards the equalization payment. A payment that is not secured by any asset of value sufficient enough to provide true protection.

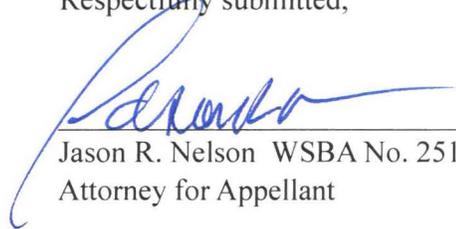
The decision of the trial court was neither just nor equitable.

CONCLUSION

The trial court abused its discretion in this matter. The imputation of income to Mr. Clark is not supported by the evidence and contrary to existing law. The determination that Mr. Clark alone pay post-secondary educational support and that he pay more than his proportionate share is directly contrary to existing statutes and case-law. The facts in this matter supported an award of maintenance from Dr. Clark to Mr. Clark. The admission of testimony regarding marital misconduct was improper and created a clear inference that it influenced the decision of the trial court. The extreme sanction of denying the testimony of a witness and excluding evidence without the requisite showing of intentional nondisclosure, willful violation of a court order or other unconscionable conduct was an abuse of discretion. Lastly, the division of property was neither just nor equitable. Mr. Clark requests that the appellate court

reverse the trial court's decisions regarding the above.

Respectfully submitted,



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DECLARATION OF SERVICE

I, Cheryl Growt, under penalty of perjury pursuant to the laws of the State of Washington, declare that on this 19th day of December, 2016, I sent via personal delivery a copy of this brief to attorney Martin Salina, 601 West Riverside, Suite 1500, Spokane, WA 99201.

Signed at Spokane, Washington on this 19th day of December, 2016.



CHERYL GROWT, Legal Assistant