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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

CONSOLIDATED CASES

MARY ALICE CARLSON, Respondent, Cross-Appellant

v.

HUGH DAVID CARLSON, Appellant, Cross-Respondent

_____ **AND** _____

HMD LIMITED PARTNERSHIP, Appellant

v.

**MARY ALICE CARLSON and SOUTH 80 ORCHARDS LP,
Respondents**

**RESPONDENT/CROSS-APPELLANT'S
RESPONSIVE BRIEF**

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1. The Trial Court erred in limiting Mrs. Carlson to three years of spousal maintenance in an amount which was effectively only \$2,000.00 per month. 4

ISSUE: Did the Trial Court abuse its discretion by granting Wife only three years spousal maintenance in an amount of \$3,000.00 where only \$2,000.00 was paid for the support of Wife in a 23 year marriage (26 years by the time of trial)? Yes.

2. The Trial Court erred in characterizing HMD Limited Partnership as separate property while at the same time characterizing Mrs. Carlson's 6.5% in HMD as community property and South 80 Orchards as community property. 4

ISSUE: Did the Trial Court abuse its discretion in characterizing the same asset, HMD, as the separate property of Husband and community property when awarding a portion to Wife and treating South 80 Orchards, LLC as community property when it had been operated and commingled in the same manner as HMD? Yes.

3. The Trial Court erred in treating the debt owed to HMD as a community liability 4

rather than the separate debt of Mr. Carlson because it was incurred after separation.

ISSUE: Did the Trial Court abuse its discretion in characterizing the HMD debts arising after August 2012 as community property when such was incurred by Mr. Carlson alone after the July 2012 date of separation? Yes.

4. The Trial Court erred in deducting pre-judgment interest from the \$65,000 that Mrs. Carlson was awarded for her 6.5% interest in HMD Limited Partnership. 4

ISSUE: Did the Trial Court abuse its discretion in applying pre-judgment interest to an amount which was not liquidated-an amount which could not be determined until after the Trial Court determined how much of that sum belonged to each party? Yes.

5. The Trial Court erred in limiting Mrs. Carlson's award of attorney's fees and costs for intransigence to only \$50,000.00. 5

ISSUE: After finding the conduct of Mr. Carlson was intransigent in many respects, did the Trial Court abuse its discretion in limiting the attorney's fees to Mrs. Carlson to an amount which was one third of what was requested where the impact of such conduct impacted millions of dollars in property? Yes.

6. The Trial Court erred in awarding to Mr. Carlson all of the owned farming property, all of the residences and shops. 5

ISSUE: Did the Trial Court fail to adequately consider the economic circumstances of the parties in the division of farm properties when only one side was awarded all of the property owned in fee, all of the residences and all of the shops?
Yes.

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I. INTRODUCTION

This case involved the dissolution of combined community property and farming business enterprises which were intermixed over a long period of 23 years. It also involved consideration of all of the assets of both parties including both separate and community property in an action which consolidated Yakima Superior Court Cause No. 13-3-00578-9 and 13-2-04263-0. The consolidation of which Mr. Carlson complains was as the result of an agreed order. CP at 1716. In her response and cross-appeal Mrs. Carlson addresses these combined and inter-related issues in a consolidated brief.

In addition to considering all community and separate property of the parties the court dealt with substantial intransigence by Hugh David Carlson which included fraudulently altered business records in HMD Limited Partnership by Mr. Carlson, hidden fruit proceeds, padding expenses through prepayments, and violations of an interim farming order under which Mr. Carlson built new orchards and paid his own attorneys' fees, which were not allowed by the order and under which order he paid all of his own personal expenses. Mr. Carlson secreted substantial crop proceeds which required an exercise

in forensic accounting to account for the crop proceeds. Ultimately and as part of its ruling the court found that Mr. Carlson had engaged in intransigence and awarded attorneys' fees and costs, spousal maintenance and a disproportionate division of community property when the Trial Court made its fair and equitable distribution of assets and liabilities.

II. STATEMENT OF ISSUES / ASSIGNMENTS OF ERROR.

A. STATEMENT OF ISSUES IN RESPONSE TO APPEAL BY HUGH DAVID CARLSON.

1. Whether the Trial Court abused its discretion in determining an annual salary offset \$25,000.00 per year for Mr. Carlson after considering that all of Mr. Carlson's personal expenses were paid for from the farming operations and he had little out of pocket expenses? No.
2. Whether the Trial Court abused its discretion in determining the Scenic Loop Lot property as separate property of Mary Carlson when it was shown to have been purchased with the separate insurance proceeds she obtained following the death of her son from another marriage? No.
3. Whether the Trial Court abused its discretion in determining the amount of spousal maintenance at \$3000.00 per month in addition to a disproportionate division of community property? No.
4. Whether the Trial Court abused its discretion in dividing the parties' bank accounts at Solarity Credit Union? No.

5. Whether the Trial Court abused its discretion in determining that Mr. Carlson was “intransigent” and in awarding attorneys’ fees and costs to Mrs. Carlson? No.
6. Whether the Trial Court abused its discretion in its allocation of the debt to HMD Limited Partnership solely to Mr. Carlson? No.
7. Whether the Trial Court abused its discretion in making a disproportionate division of assets and liabilities? No.

B. STATEMENT OF ISSUES IN RESPONSE TO THE APPEAL OF HMD LIMITED PARTNERSHIP.

1. Whether the Trial Court erred in determining the loans of \$318,400.00 which HMD Limited Partnership alleged were incurred in 2002, 2007 and 2009 were barred by the three year statute of limitations? No.
2. Whether the Trial Court erred in denying prejudgment interest on the funds removed from the HMD account and placed in the registry of the Court from January 7, 2014 to September 25, 2015? No.
3. Whether the Trial Court erred in determining that the value of Mrs. Carlson’s 6.5% interest in HMD was worth \$65,000.00 when Mr. Carlson admitted that HMD was worth between \$1,000,000.00 and \$1,250,000.00? No.

C. ASSIGNMENTS OF ERROR REGARDING THE CROSS-APPEAL OF MARY CARLSON.

Respondent/Cross-Appellant Mary Carlson makes the following assignments of error:

1. The Trial Court erred in limiting Mrs. Carlson to three years of spousal maintenance in an amount which was effectively only \$2,000.00 per month.

ISSUE: Did the Trial Court abuse its discretion by granting Wife only three years spousal maintenance in an amount of \$3,000.00 where only \$2,000.00 was paid for the support of Wife in a 23 year marriage (26 years by the time of trial)? Yes.

2. The Trial Court erred in characterizing HMD Limited Partnership as separate property while at the same time characterizing Mrs. Carlson's 6.5% in HMD as community property and South 80 Orchards as community property.

ISSUE: Did the Trial Court abuse its discretion in characterizing the same asset, HMD, as the separate property of Husband and community property when awarding a portion to Wife and treating South 80 Orchards, LLC as community property when it had been operated and commingled in the same manner as HMD? Yes.

3. The Trial Court erred in treating the debt owed to HMD as a community liability rather than the separate debt of Mr. Carlson because it was incurred after separation.

ISSUE: Did the Trial Court abuse its discretion in characterizing the HMD debts arising after August 2012 as community property when such was incurred by Mr. Carlson alone after the July 2012 date of separation? Yes.

4. The Trial Court erred in deducting pre-judgment interest from the \$65,000 that Mrs. Carlson was awarded for her 6.5% interest in HMD Limited Partnership.

ISSUE: Did the Trial Court abuse its discretion in applying pre-judgment interest to an amount which was not liquidated—an amount which could not be determined until after the Trial Court determined how much of that sum belonged to each party? Yes.

5. The Trial Court erred in limiting Mrs. Carlson's award of attorney's fees and costs for intransigence to only \$50,000.00.

ISSUE: After finding the conduct of Mr. Carlson was intransigent in many respects, did the Trial Court abuse its discretion in limiting the attorney's fees to Mrs. Carlson to an amount which was one third of what was requested where the impact of such conduct impacted millions of dollars in property? Yes.

6. The Trial Court erred in awarding to Mr. Carlson all of the owned farming property, all of the residences and shops.

ISSUE: Did the Trial Court fail to adequately consider the economic circumstances of the parties in the division of farm properties when only one side was awarded all of the property owned in fee, all of the residences and all of the shops? Yes.

III. STATEMENT OF THE CASE

A. MR. CARLSON'S STATEMENT OF FACTS FAILS TO COMPLY WITH RAP 10.3(5).

Mr. Carlson's brief fails to comply with RAP 10.3(5) and set forth the statement of facts without argument. Mr. Carlson, on page 8 of his brief, becomes entirely argumentative rather than stating what

the Trial Court actually did in its division of assets and liabilities. Mr. Carlson invents values and scenarios which are purely argumentative and which did not occur in the rulings of the Trial Court. Mr. Carlson's argumentative assertions are not supported by any reference to the records but merely present argument about what Mr. Carlson believes the numbers *should have shown*. Mr. Carlson's argumentative assertions should be stricken or ignored.

B. THE CONSOLIDATED ACTION.

This case involved a consolidated action, CP at 1716. An agreed order was entered following a motion to consolidate filed by HMD Limited Partnership, CP at 1716. All parties agreed with the consolidation, CP 1716. The consolidated action included the dissolution proceedings and various claims and defenses between the parties, South 80 Orchards and HMD Limited Partnership.

C. THE MARRIAGE AND FARMING ENTITIES.

Mr. and Mrs. Carlson were married on May 6, 1989. They separated in July 2012, CP at 1308 par. 2.5. Their primary source of income was farming. Mr. Carlson also worked for Borton Fruit as a consultant and was paid \$6,500.00 per month, RP at 19.

In 2002 Mr. Carlson had most of his separate property taken from him by creditors in bank foreclosure actions. RP 354. Mr. Carlson took the position that he had no interest in South 80 Orchards LLC. RP at 161. Mr. Carlson eventually filed for bankruptcy, and he did not list any interest in South 80 Orchard assets in his bankruptcy estate. RP at 161, 354.

Mr. Carlson changed the names on the South 80 books and accounts to Carlson Agribusiness in December of 2011 over the objection of Mrs. Carlson. RP at 2, 152, 153. Mr. Carlson was never a general or limited partner of South 80 Orchards. RP at 151. Notably, the Trial Court found the farming entities were run

“very loosely, very little attention or respect paid to the various corporate entities. They were really almost outward shells so that outsiders would see that these were corporate entities, but they, they moved in and out of them with kind of personal flavor to it.”

CP at 289-290. Even though Mr. Carlson filed bankruptcy and disavowed any interest in the South 80 assets of Mrs. Carlson, the Trial Court found that the Carlsons began the migration of assets from

South 80 Orchards into their various other business entities, CP at 290. As a result the Trial Court found South 80 had been commingled and was characterized as community property. RP at 290. South 80, however, still had other limited partners – something which the Trial Court never really addressed. Mary Carlson owned 65.4% of South 80. The remainder was owned by Nick Carlson (David Carlson’s son and Mary Carlson’s step-son) Joe Benetti and Toni Flabetich. RP at 160.

As to HMD Limited Partnership, the Trial Court did not similarly treat this entity as community property even though HMD was one of the various farming entities and was used as a piggy bank:

“I find that the parties have, I think Mr. Maxwell used the term, they, he used it with regard to HMD as the piggy-bank, and I think they used all of their accounts in a very cavalier and frivolous way, moving money back and forth.”

CP at 294.

The Trial Court instead determined HMD Limited Partnership would be characterized as the separate property of Mr. Carlson, except the \$65,000.00 (less interest) that Mary Carlson was awarded as representing her 6.5% interest in HMD Limited

Partnership. CP at 84, 288:3, 301:16-18. The \$65,000.00 amount for Mrs. Carlson's 6.5% interest was based on HMD Limited Partnership being worth \$1,000,000.00 to \$1,250,000.00, which was a value provided by Mr. Carlson. RP at 677, 605:22. The \$65,000.00 awarded to Mary Carlson was treated as community property and counted towards her allocation of community property whereas the balance of the \$1,000,000.00 in assets of HMD Limited Partnership was treated as separate property, was awarded to Mr. Carlson and was not subject to any further division by the Court. CP at 302:3-6, 304:5-7.

D. THE DIVISION OF COMMUNITY AND SEPARATE PROPERTY.

After hearing all of the evidence the Trial Court divided the community property on a 55%/45% basis disproportionately in favor of Mrs. Carlson. CP at 13: 2-3. The Trial Court allocated Mrs. Carlson \$65,000.00 for her 6.5% interest in HMD Limited Partnership as community property. CP at 288, 301, 302. The entire remaining \$1,000,000.00 interest in HMD Limited Partnership and remaining bank proceeds was allocated to Mr. Carlson as his separate property.

CP at 304:5. Mrs. Carlson was allocated the Scenic Lot as her separate property. CP at 303:4, 1357 par. 2.9.

In determining the 55%/45% division the Trial Court added up the values it assigned to the community property allocated to Mr. and Mrs. Carlson, allocated a debt of the community it determined was owing to HMD to Mr. Carlson to reduce his allocated amount and then further reduced it by a credit it determined for his farming activities over the previous three years. CP at 301-302. To balance the property award and make it 55%/45% the Trial Court included a transfer payment amount that Mr. Carlson owed to Mrs. Carlson in the amount of \$180,740.00. CP at 302:23, 1344. Finally, the bank accounts and crop proceeds were divided 55%/45% in favor of Mrs. Carlson. CP at 298, 299.

In allocating properties the Trial Court endeavored to divide the property 55%/45% to allow both parties to continue farming. CP at 295. The Trial Court allocated the 901 Ranch lease to Mr. Carlson even though that was held by South 80 Orchards and was a Department of interior Yakama Indian Trust property lease. CP at 296, Exhibit RE

112. Mr. Carlson was also awarded the Homeplace Orchard and the Sno Valley Orchards. CP at 296. The Homeplace had a house and shop necessary for farming activities. RP at 23-24, 567, 688. The Sno Valley Orchard has a two bedroom residence. RP at 27. Mr. Carlson was also awarded the West-50 property. CP at 301:2-3. In the end Mr. Carlson received all of the property which the community owned in fee and Mrs. Carlson was awarded only three leased farming properties referred to as 902, 903 and 941. None of the leased properties awarded to Mrs. Carlson included a residence or a shop building for storing or maintaining farm equipment.

E. LOANS CLAIMED BY HMD LIMITED PARTNERSHIP.

The Trial Court considered and disposed of claims that HMD Limited Partnership had made loans which were owing. HMD claimed loans made in 2003 and 2007 in the amount of \$153,400.00 and \$160,400.00. HMD also claimed it made loans between July 2009 and September 2009 in the amount of \$165,000.00. CP at 1329. The Trial Court dismissed these claims with prejudice based on the applicable statute of limitations. CP at 292:1-21, 1314, 1329. The Trial

Court found HMD was still owed \$216,654.00 on loans of \$400,000.00 after accounting for a payment of \$221,850.00 which it found had been made. CP at 293, 1314, 1329. These loans were incurred by Mr. Carlson after the date of separation. Exhibit RE 106. The Court allocated that liability to Mr. Carlson as part of the division of community property and liabilities. CP at 294: 18, 1327 par. 3, 1329 par. 6. When allocating all HMD liability to Mr. Carlson the Trial Court stated:

Well, I'll tell you, the debt has been allocated for, owed to HMD, goes to Mr. Carlson, but if, if there is a concern that this is a joint debt, my alternative would be to treat it as an existing debt, and I would award it all to Mr. Carlson, and I would not count it in the overall calculation, and the reason I would do it that way is because Mr. Carlson has a unique relationship with HMD. It's his family. It's essentially his corporation, and there's been no effort to collect the money, and I wouldn't impose that scenario on Mrs. Carlson and obligate her to several hundred thousand dollars when the reality is so different from the technical business application or business perspective.

CP at 294-295.

The Trial Court also questioned Mr. Carlson's need to borrow funds from HMD given the fruit proceeds that Mr. Carlson had concealed from Borton Fruit (approximately \$400,000.00 in 2014, \$198,695.64 in 2013, and \$51,673.25 in 2010):

He describes himself as a very highly-qualified farmer and orchardist. Money was not overabundant. They were borrowing money constantly from HMD. How would you miss, and I asked that- it was essentially a rhetorical question, I guess, but I wanted to see what I, what the answer was, is that how could you not miss that money? If you're writing checks out of, from HMD, you're working extra jobs because you don't have the money, and you're highly-qualified, you'd know that money was missing, and I think he knew that money was missing. I think it, I, I think he, I think he arranged that with Borton. I don't know how I come to any other conclusions but that, that he arranged that the money would be held by Borton and still owed, would be paid by Borton, but it would be paid at a later date.

CP at 308:3-17. See CP 307 (2014 crop proceeds approx. \$400,000), CP 1362 par. 10 (2013 crop proceeds \$198,695.64), CP at 1362 par. (2010 crop proceeds \$51,673.25).

F. THE INTRANSIGENT CONDUCT OF MR. CARLSON.

Throughout the case, Mr. Carlson made it difficult for Mrs. Carlson to receive a fair and equitable division of property. These actions included outright document forgeries, concealment of assets, prepayment of expenses, and failure to comply with the Interim Farming Order including the failure to provide accountings, and diverting funds to building unauthorized orchards.

1. The Unsuccessful Document Forgery Attempt With Respect to HMD.

Mrs. Carlson owned a combined 6.5% interest in HMD as general partner and limited partner. Sometime prior to trial the HMD Limited Partnership records were fraudulently altered to remove Mrs. Carlson's Ownership interest. Exhibit PE 15,15A. A forensic document examiner James Tarver testified by way of perpetuation deposition demonstrating this fraud in which a signature page was taken from a prior partnership document and then altered and attached to a subsequent document which purported to strip Mrs. Carlson of her ownership interest in HMD. RP at 401-434. The Court found there was

a forged document attempt and that Mr. Carlson was clearly the force behind it. CP at 305-306.

2. Concealment of Fruit Proceeds.

The Trial Court found there were fruit proceeds belonging to the community at Borton fruit from 2010 in the amount of \$51,673.25. CP at 1313. There were also fruit proceeds at Borton fruit from 2013 in the amount of \$198,695.64 being held on account. In addition, Mr. Carlson disclosed at trial there was an additional amount also still held at Borton Fruit from 2014 in the amount of approximately \$379,000.00 (referred to by the Trial Court as \$400,000.00 in its oral ruling). Exhibit RE 149, CP at 306-308. The forensic accountant, Matt Peterson, testified there were approximately \$636,455.87 in missing fruit proceeds in his report and testimony. CP at 96, Exhibits PE 14, 14A. The Trial Court found Mr. Carlson had attempted to conceal these fruit proceeds under an arrangement with Borton Fruit. CP at 308:13-17.

3. Building the New Sno Valley Orchard.

Mr. Carlson was allowed to manage the orchards under the Interim Farming Order prior to trial. CP at 76. The order listed the

properties on which expenses could be made. In violation of this order, Mr. Carlson proceeded to develop a new orchard referred to as the New Sno Valley Orchard. RP at 35, 36-44. Mrs. Carlson documented the expenses diverted to build this orchard in Exhibits 6.6A, 7 and 7A. The Trial Court found Mr. Carlson had diverted \$300,000.00 in funds to the New Sno Valley Orchard and credited him with that in the property division. CP at 309-310.

4. Prepayment of Packing Expenses.

Mr. Carlson had also prepaid packing expenses of \$221,350.00 which showed on account. RP at 120,686. The Trial Court determined this was another attempt to conceal proceeds. CP at 308-309.

5. Mr. Carlson Failed to Comply With the Interim Farming Order.

Under the Interim Farming order Mr. Carlson was required to have a co-signature on any check or expenditure which was over \$2000.00. CP at 76, RP at 87-88. Mr. Carlson never obtained any co-signatures. RP at 504.

The Interim Farming Order at paragraphs 8 and 9 required a periodic monthly accounting and a certification by an accountant, Bill Halsey, that all expenses were reasonable business expenses. Mr. Halsey, however, never reviewed the fruit proceeds records or verified that fruit income was paid and deposited to the farming account. RP at 504. Mr. Halsey testified he received three envelopes each month from Mr. Carlson and after reviewing the information in his envelope inserted a certification letter in the envelope going to Mrs. Carlson without ever confirming the contents of that envelope were the same as the information he reviewed. RP 505. Mr. Halsey was surprised that copies of checks, bank statements and general ledgers he reviewed were not included in the reports to Mrs. Carlson. RP at 524, 525.

Notwithstanding the Interim Order specifically precluded Mr. Carlson from paying his own attorney's fees from the farm account, Mr. Halsey did not report those unauthorized payments. RP 523. On examination, Mr. Halsey admitted he did nothing to confirm whether any of the expenses which he reported as "not unusual" were actually spent on the ranches identified in the Interim Farming Order. RP at 509, 511, 522.

Mrs. Carlson received a reports from February 2014 through January 2015 and then the reports stopped. RP at 28. The reports received did not include any accounting of fruit proceeds and nothing matched in the accountings. RP at 31.

G. THE FACTORS CONSIDERED IN DETERMINING MR. CARLSON'S COMPENSATION FOR FARMING DURING THE SEPARATION PERIOD.

The Trial Court attempted to divide the community property so each party would be able to continue to farm and made a 55%/45% division in favor of Mrs. Carlson. CP at 295-296. In dividing the properties the Trial Court determined an offset amount as a credit for Mr. Carlson's running of the farms during the separation. Mr. Carlson requested an offset credit of \$85,000.00 per year, however, the Trial Court determined his offset should be \$25,000.00 per year for the period of three years resulting in a total offsetting credit of \$75,000.00. CP at 302.

This was based on the fact that Mr. Carlson was essentially managing his own properties including those which were awarded to Mr. Carlson in the final division. CP at 302. In addition Mr. Carlson

had no personal expenses and used the farming account to pay for his personal living expenses, car washes, out of town fuel, power bills, tv bill, and property taxes for the HMD Partnership Property. RP at 42, 189-199, Exhibit PE 6, 6A, 7, 7A (under the column PERS). Mr. Carlson testified his personal living expenses were only \$1,800.00 per month. RP at 611. Under the Interim Farming Order Mr. Carlson had full control of the farms and crop proceeds. CP at 76. Mr. Carlson lived for free in the Homeplace property upon which there was no mortgage debt while he managed the farming operations.

H. THE SCENIC PROPERTY LOT.

Mrs. Carlson testified she purchased the Scenic lot with life insurance proceeds she received from the death of her son, Joseph D. RP at 222. She used the life insurance proceeds to set up a company called RMT Holdings named after she and her sons. On August 25, 2006 RMT purchased the Scenic lot. RP at 352, Exhibit PE 1.29. There was no evidence of any community funds into this account prior to the August 2006. After the purchase of the Scenic lot, some of Mr. Carlson's consultant checks were deposited into a different RMT bank account to shield them from creditors who were pursuing Mr. Carlson.

Those deposits were subsequent to the purchase and into a different account. RP at 165,166,352.

I. THE AWARD OF SPOUSAL MAINTENANCE AND RELATED INSURANCE PROVISION.

Mrs. Carlson earned \$500-850 per month from employment and was not yet eligible for social security. RP at 4. Her monthly expenses exceeded the maintenance she was receiving and required her to make up the difference by incurring debt. Exhibit PE 5. RP at 9. This included rent expenses because she was not awarded any farm properties with a residence. In addition to what he could earn from farming, Mr. Carlson's monthly income included \$6,500.00 as a consultant, \$2,400.00 from social security, and \$1,200.00 in retirement benefits. RP at 19. Other than his alimony obligation and boat payment, Mr. Carlson indicated that his monthly living expenses were only \$1,800.00 per month. RP at 611.

Mrs. Carlson was 60 years old and Mr. Carlson was 72. CP at 304. Mrs. Carlson requested spousal maintenance in the amount of \$5,000.00 until age 67 and then \$3,000.00 per month for life. RP at 18-19. The Trial Court determined Mr. Carlson should pay \$3,000.00 per

month for only three years. The Trial Court further determined that the actual amount Mrs. Carlson would receive would only be \$2,000.00 and that \$1,000.00 per month of the spousal maintenance be allocated to maintain payments on life insurance policies. CP at 305:6-14. Thus, in a marriage of 23 years, Mrs. Carlson was only awarded three years of spousal maintenance at only \$2,000.00 per month since the other \$1,000.00 went as a payment on life insurance policies. Notwithstanding the deduction of the full payment Mrs. Carlson was only awarded 50% of the potential death benefit. RP at 299:21.

J. THE SOLARITY BANK ACCOUNTS.

There were multiple bank accounts at Solarity Credit Union including two IRA accounts which were set out in the Findings of Fact and Conclusions of Law and divided in the Decree. CP at 1313 par. 8(c), CP at 1322 (12-16), 1324-25 (13-18). These accounts included a mixture of community property and separate funds. RP at 205. The Solarity Credit Union accounts were determined to be community property, CP at 1313. The accounts were divided 55%/45% just like the crop proceeds. CP at 298.

K. THE AWARD OF ATTORNEYS' FEES AND COSTS TO MRS. CARLSON.

The Trial Court awarded attorneys' fees and costs to Mrs. Carlson. In making its determination to award attorneys' fees and costs the Trial Court determined Mr. Carlson was "intransigent". CP at 309, 1309 par. 2.15. This was based on the conduct of Mr. Carlson which included an attempt to eliminate Mrs. Carlson from her ownership in the HMD Limited Partnership with forged documents (CP at 305-306), substantial concealed fruit proceeds which the Trial Court found Mr. Carlson had "arranged that with Borton" Fruit (CP 306-308), and prepayment of packing charges (CP at 308-309). The Trial Court also allocated \$300,000.00 in value to Mr. Carlson for crop proceeds which were used to build the new Sno Valley Orchard. CP at 309-310. Expenditures on this orchard development were not allowed by the Interim Farming Order because that property was not included on the list of properties. CP at 76. Mrs. Carlson testified over \$700,000.00 in crop proceeds had been diverted by Mr. Carlson to develop the new Sno Valley Orchard. RP at 44 ln 5-14, Exhibits PE 6.6A, 7 and 7A.

The attorneys' fees and costs were presented by counsel and expert witnesses in the amount of \$148,183.00 in fees and \$10,028.00 in costs and expert expenses. CP at 86, 128. In addition Mrs. Carlson claimed forensic accounting expenses of \$28,151.90. CP at 110. The Court awarded \$50,000.00 in attorneys' fees and costs in the final decree and included the finding that the award of fees and costs was based on intransigent conduct by Mr. Carlson. CP at 1309, 1319.

**IV. ARGUMENTS IN RESPONSE TO APPEAL OF
HUGH DAVID CARLSON.**

A. STANDARD OF REVIEW.

The review of trial court decisions in dissolution actions is governed by the abuse of discretion standard. In Re Marriage of Stenshoel, 72 Wn. App. 800, 803, 866 P.2d 635 (1993). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In Re Marriage of Littlefield, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). The trial court's findings of fact are reviewed to determine whether they are supported by substantial evidence. In Re Marriage of Stachofsky, 90 Wn. App. 135, 144, 951 P.2d 346 (1998). Substantial evidence is

evidence of sufficient quantity to persuade a reasonable fact finder of the truth of the declared premise. Holland v. Boeing Co., 90 Wn.2d 384, 390–91, 583 P.2d 621 (1978).

RCW 26.09.080 requires that the trial court make a ‘just and equitable’ distribution of the parties' property and liabilities. ‘An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of the parties.’ In Re Marriage of Crosetto. 82 Wn.App. 545, 556, 918 P.2d 954 (1996).

B. THE COURT PROPERLY CONSIDERED THE FACTORS UNDER RCW 26.09.080 IN MAKING A FAIR AND EQUITABLE DIVISION OF ASSETS AND LIABILITIES.

The factors for consideration under RCW 26.09.080 include (1) the nature and extent of community property, (2) the nature and extent of separate property, (3) the duration of the marriage or domestic partnership, and (4) The economic circumstances of each spouse ... at the time the division is to become effective... Id. All of

these factors were properly considered by the Trial Court in its property division.

1. The Nature And Extent of The Community Property.

The Court went through all of the community property and determined values which it used in its division. It also considered credits and offsets to the property division for liabilities and labor by Mr. Carlson. CP at 295-302.

2. The Nature And Extent of The Separate Property.

The Trial Court also analyzed the nature and extent of the separate property. Ultimately it awarded the entire HMD Limited Partnership to Mr. Carlson as separate property less \$65,000.00 to Mrs. Carlson. This is the substantial consideration of separate property factor which Mr. Carlson completely overlooks in his analysis. The HMD award included the loan proceeds (which was neutralized by the allocation of that community liability to Mr. Carlson), the balance of the bank account funds of \$165,133.17, CP at 84, and all of the other HMD Limited Partnership real property assets. At the time of trial these real property assets included the Sno Valley Ranch, Property Lots in Grandview, A contract receivable from a sale of Grandview

property. Mr. Carlson also broke down the HMD asset values during his testimony. RP at 617-675. Mr. Carlson testified that the HMD assets were valued at \$1,000,000.00 - \$1,250,000.00 and Mrs. Carlson's interest in HMD at 6.5% was \$65,000.00. RP at 677, 605; 22. The Trial Court awarded Mrs. Carlson exactly \$65,000.00 for her interest in HMD Limited Partnership. CP at 288:3. Clearly, the total value of HMD as determined by the Trial Court was \$1,000,000.00. Notwithstanding Mr. Carlson's claim that there are other siblings who are also owners of HMD, the Trial Court found that "Mr. Carlson has a unique relationship with HMD. It's his family. It's essentially his corporation." CP at 294-295. The Trial Court characterized the availability of HMD assets as follows:

"they, he used it with regard to HMD as the piggy-bank, and I think they used all of their accounts in a very cavalier and frivolous way, moving money back and forth."

CP at 294:4-7. Mr. Carlson now had virtually unfettered access to \$1,000,000.00-\$1,250,000.00 after paying Mrs. Carlson only \$65,000.00. This provided a substantial reason for a disproportionate division of community property.

Mrs. Carlson, on the other hand, was awarded only a small percentage of the cash from the bank account of HMD Limited Partnership, which the Trial Court counted as community property, notwithstanding that the partnership documents described her ownership as her separate property. Exhibits PE 15 and PE 15A. The Trial Court awarded only the Scenic lot to Mrs. Carlson as separate property which it valued at \$75,000.00 CP at 303.

Clearly, Mr. Carlson was awarded substantially more separate property than Mrs. Carlson and that also would support the 55%/45% of community property as a counter-balance. When this separate property is added to the total overall division, Mr. Carlson actually was awarded substantially more than Mrs. Carlson. Mrs. Carlson is the only party that has a valid complaint that she did not receive a fair and equitable division when the overall property division was considered.

3. The Duration of The Marriage.

The Trial Court clearly considered the duration of the marriage on the division of property and the long history of joint management. CP at 294, 304. Mr. and Mrs. Carlson were married 23

years; it was not a 25 year-plus marriage. RP at 1. Contrary to Mr. Carlson's arguments, if this factor was given more weight in division and the cases cited by Mr. Carlson were followed, the Trial Court would have divided all assets and income equally for life and would have justified an even higher percentage of community property to Mrs. Carlson. In Re Marriage of Kim, 179 Wn. App. 232,253, 317 P. 3d 555, 556 (2014) (Court awarded 60% of community property to wife); In Re Marriage of Rockwell, 141 Wn. App. 235, 243, 170 P. 3d 572, 576 (2007) (a 60/40 split in favor of wife considering property and income). Mr. Carlson received a higher social security payment and had additional consultant income from Borton Fruit. Application of cases such as Kim and Rockwell would have actually required more from Mr. Carlson.

4. The Economic Circumstances of The Parties.

Mr. Carlson had more combined community and separate property following the division than Mrs. Carlson. Mr. Carlson received a social security payment of \$2,400.00 per month a retirement payment of \$1,200.00 per month and he also earned higher wages of \$6,500.00 per month as a consultant in addition to what he

could earn farming. RP at 19. Mrs. Carlson earned between \$500 – \$800 per month and was not eligible for social security until age 67 at which time she expected \$1,100.00 per month. RP at 4, 19. The economic circumstances of both parties were considered by the Trial Court in making its division of property.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS CHARACTERIZATION OF PROPERTY AND DIVISION OF PROPERTY.

Property divisions are reviewed for abuse of discretion. In Re Marriage of Neumiller, 183 Wn. App. 914, 920, 335 P. 3d 1019 (2014). A deferential standard of review is applied to the trial court's consideration of these factors because it is “in the best position to assess the assets and liabilities of the parties” in order to determine what constitutes an equitable outcome. Id. at 920. The Trial Court did not abuse its discretion in its characterization or division of property.

Mr. Carlson confuses the concept of characterization of property with the concept of a fair and equitable division of property in his argument. RCW 26.09.080 requires the Trial Court to undertake a fair and equitable division of property and liabilities considering the

nature and extent of all of the community property and all of the separate property among other factors. Id. The characterization of property is just one of the steps determining a fair and equitable division. Whether property is determined to be community or separate is not necessarily controlling. Property must be disposed of in a dissolution proceeding in just and equitable manner considering all circumstances; characterization of property as community or separate is not controlling. In Re Marriage of Pearson-Maines, 70 Wn. App. 860, 855 P.2d 1210 (1993). Although character of property is a relevant factor to its distribution, it is not determinative. Stachofsky v. Stachofsky, 90 Wn. App. 135, 951 P.2d 346 (1998), review denied 136 Wn.2d 1010, 966 P.2d 904.

Likewise, the Trial Court did not abuse its discretion in making a disproportionate division of community property which favored Mrs. Carlson. Mr. Carlson completely ignores that his separate property award including HMD Limited Partnership Properties gets factored into the fairness of the division when the Court considers all community and separate property. Mr. Carlson is unable to

demonstrate and abuse of discretion nor does his attempts to recalculate the Courts exercise of discretion change this result.

Although the property division must be “just and equitable,” it does not need to be equal. In Re Marriage of Larson and Calhoun, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013); In Re Marriage of Rockwell, 141 Wn. App. 235,243, 170 P.3d 572 (2007). Nor does it need to be mathematically precise. Larson, 178 Wn. App. at 138, 313 P.3d 1228. Rather, it simply needs to be fair, which the trial court attains by considering all circumstances of the marriage and by exercising its discretion—not by utilizing inflexible rules. In Re Marriage of Doneen, 197 Wn. App. 941, 949, 391 P. 3d 594 (2017). RCW 26.09.080 requires that the trial court make a ‘just and equitable’ distribution of the parties’ property and liabilities. ‘An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of the parties.’ In Re Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996).

Notwithstanding his arguments to the contrary, Mr. Carlson does not demonstrate an abuse of discretion by suggesting that the Trial Court should have calculated the division a different way.

The Trial Court did not abuse its discretion in factoring in an offset credit of \$25,000.00 per year for Mr. Carlson's work managing the farms. When the Trial Court went through its exercise in creating the 55%/45% division of community property it totaled up property for Mr. Carlson and Mrs. Carlson, allocated the HMD debt to Mr. Carlson and then subtracted the \$75,000.00 compensation figure from the asset total allocated to Mr. Carlson. This derived a transfer payment which the Trial Court calculated to be \$180,740.00 which was to be a net transfer amount in addition to the remaining division of crop proceeds and bank accounts which the court also divided 55/45%. There was no abuse of discretion in doing it this way. His compensation was lower because he was farming his own properties, had minimal living expenses and lived on the farm properties rent free. CP at 302, RP at 42, 611, 189-199, Exhibits PE 6, 6A, 7, 7A (denoted PERS).

The Trial Court did not abuse its discretion in determining the Scenic lot was separate property of Mrs. Carlson. That property was separate from inception because it was purchased with the separate life insurance proceeds from the death of her son. The character of property as separate or community property is determined at the date of acquisition. Harry M. Cross, *The Community Property Law*, 61 Wash. L. Rev. 13, 39 (1986). Under the “inception of title” theory, property acquired subject to a real estate contract or mortgage is acquired when the obligation is undertaken. *Id.*; see also *In Re Estate of Binge*, 5 Wn.2d 446, 105 P.2d 689 (1940); *Beam v. Beam*, 18 Wn. App. 444, 453, 569 P.2d 719 (1977). If the property was separate property at the time of acquisition, it will retain that character as long as it can be traced and identified. *Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972). The testimony and evidence submitted by Mrs. Carlson on the Scenic property supported this finding.

The Solarity Credit Union accounts were determined to be community property. CP at 1313. These included several bank accounts and IRA accounts which were divided 55%/45%, CP at 295:9-12, 1322, 1324. Mr. Carlson cites little or no contrary facts to

dispute this characterization. The actual attachments referenced at footnote 21 of Mr. Carlson's brief, CP 250-255, were not trial exhibits and to the contrary show multiple accounts including IRA accounts. The details on the accounts do not show a net deposit of post separation income but rather a net decline in the balances. When asked about the Solarity Credit Union accounts Mrs. Carlson testified there was a combination of community and some separate funds. RP at 205. This was sufficient to establish they were commingled and properly characterized as community property. The bank account balances determined by the court subject to division were contained in the bank account records submitted as exhibits. PE 19 and RE 143.

Regardless of the character the Trial Court may include separate and community property in fashioning a fair and equitable division. In Re Marriage of Griswold, 112 Wn. App. 333, 346, 48 P.3d 1018 (2002) (affirming a distribution of 50 percent of the community property plus a percentage of separate property of the other spouse); In Re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985) (affirming property distribution in which the wife received both 50 percent of community property and 30 percent of the husband's

separate property); Ramsdell v. Ramsdell, 47 Wn. 444, 445–46, 92 P. 278 (1907) (affirming an award in which the wife received 100 percent of the husband's separate property upon dissolution). Therefore, the character is not necessarily controlling.

There was no abuse of discretion in making the award of the Solarity Credit Union accounts.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING MAINTENANCE TO MRS. CARLSON.

The Trial Court determined Mrs. Carlson had a need and Mr. Carlson had the ability to pay. RP 1309 par. 2.12. In its oral ruling which was also incorporated into the written Findings of Fact and Conclusions of Law, the Trial Court expanded on its reasons. CP at 300, 304-305. A maintenance award is within trial court's discretion. In Re Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996). It is also not an abuse of discretion to direct husband to pay and maintain premiums on life insurance policy and leave wife as beneficiary was properly interpreted by court to entitle wife, on husband's death, to full face value of insurance. See Rutter v. Rutter's

Estate, 59 Wn.2d 781, 370 P.2d 862 (1962). While Mr. Carlson can show no abuse of discretion in the award of spousal maintenance which was essentially limited to \$2,000.00 per month for three years in a 23 year marriage. Mrs. Carlson in her cross-appeal raises the issue that the maintenance award to her should have been more substantial in terms of dollars and years.

E. MOST OF THE CLAIMED HMD LOANS WERE BARRED BY THE STATUTE OF LIMITATIONS. THERE WAS NO ABUSE OF DISCRETION IN ALLOCATING THE ONE PARTIALLY UNPAID LOAN TO MR. CARLSON.

The claimed HMD loans from 2003 and 2007 as well as the 2009 loans were determined by the Trial Court to be barred by the statute of limitations. CP at 1314. That there was no error in this determination is dealt with in the argument section below which responds to the appeal arguments of HMD Limited Partnership.

As to the HMD loans from 2012 to 2013 the Trial Court determined those loans were partially paid and that there was a remaining balance owed in the amount of \$216,654.00. CP at 1314. That debt was allocated entirely to Mr. Carlson in the division of community property and lowered the property transfer amount that he

had to pay to Mrs. Carlson. CP at 2904-295, 302, 1314 par. 6. Mr. Carlson can demonstrate no abuse of discretion in making this allocation and cites no authority for his argument.

In fact, the loans in 2012 and 2013 are documented by a series of promissory notes in which Mr. Carlson solely was the maker and the payee. The dates of these notes and the alleged loans show that they were clearly made after the date of separation of July 2012. CP 1308 par. 2.4, Exhibit RE 106. (The notes were dated 8/28/2012 through 1/15/2013). Not only should these have been allocated to Mr. Carlson but they should have been determined to be his separate obligations which he incurred after date of separation of July 2012. RCW 26.16.140.

F. THERE WAS NO ABUSE OF DISCRETION IN THE AWARD OF ATTORNEYS' FEES AND COSTS.

Whether or not to award a party maintenance or attorney fees likewise is reviewed for abuse of discretion. In Re Marriage of Terry, 79 Wn. App. 866, 869-71, 905 P.2d 935 (1995). There was no abuse of discretion.

1. Fees and Costs Were Properly Based On Intransigent Conduct By Mr. Carlson.

The Trial Court went through some of the conduct of Mr. Carlson which it determined was intransigent and which justified its award of \$50,000.00 in attorneys' fees and costs in the decree. CP at 305-309. This discussion included Mr. Carlson forging HMD records to attempt to limit or remove Mrs. Carlson's ownership, substantial concealed fruit proceeds, which the Court found Mr. Carlson "had arranged", and unusual prepayments of expense. In addition in its property division the court attributed \$300,000.00 to Mr. Carlson for his diversion of crop proceeds to build the New Sno Valley Orchard CP 296-300. Payment of expenses from the farm account for the New Sno Valley Ranch were not permitted under the Interim Farming Order, CP 76.

The Decree set forth the \$50,000.00 award at paragraph 3.13. CP at 1319. Intransigence was entered in the Findings of Fact and Conclusions of Law. CP at 1309 at paragraph 2.15. The Findings of Fact and Conclusions of Law support the award of fees both on the basis of intransigence as well as the standards of RCW 26.09.140 citing

Mrs. Carlson's need and Mr. Carlson's ability to pay. Mr. Carlson is simply incorrect in asserting that intransigence was the only basis for the award of fees.

Mrs. Carlson had requested attorneys' fees and costs of in the amount of \$148,183.00 in fees and \$10,028.00 in costs and expert expenses. CP at 86, 128. In addition, Mrs. Carlson claimed forensic accounting expenses of \$28,151.90. CP at 110. The details of the request for fees show the total requested included \$38,179.00 for expert witness expenses to demonstrate the forged HMD documents and for forensic accounting fees to track down missing fruit proceeds which were directly related to conduct of Mr. Carlson of which the Trial Court was most critical which made an already emotional and combative case even more so unnecessarily. CP at 306.

An award of attorneys' fees and costs based on intransigence, once found, is just another equitable remedy. A party's intransigence in a marriage dissolution proceeding can substantiate a trial court's award of attorney fees, regardless of statutory factors for a fee award, as attorney fees based on intransigence are an equitable

remedy. Mattson v. Mattson, 95 Wn.App. 592, 976 P.2d 157 (1999). Determining intransigence, as a basis for awarding attorney fees in a proceeding arising from a dissolution action, is necessarily factual, but may involve foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that makes the proceeding unduly difficult or costly. Wixom v. Wixom 190 Wn. App. 719, 360 P.3d 960 (2015), review denied 185 Wn.2d 1028.

When Mr. Carlson forged HMD documents, hid fruit proceeds, padded expenses, and used funds to build a new orchard which was not authorized he was clearly intransigent. Mr. Carlson got caught and now complains about the expenses Mrs. Carlson was awarded to prove these actions and to recover property to which she was entitled. The Trial Court did not abuse its discretion finding intransigence and awarding fees on that basis. In response to Mr. Carlson's appeal the Trial Court did not abuse its discretion in awarding at least \$50,000.00. In her cross appeal, Mrs. Carlson asks this Court to expand that award.

2. Once Intransigence is Determined The Disproportionate Award of Assets is Not Relevant to The Determination of Fees and Costs.

Mr. Carlson complains the fee award was excessive in the presence of the distribution of community property. Brief of Appellant at p. 34. This argument completely ignores that an award of fees and costs on the basis of intransigence does not consider the financial resources of the parties or the ultimate property award. When one spouse's intransigence causes spouse seeking attorney fees relating to marital dissolution to require additional legal services, financial resources of spouse seeking fees are irrelevant. In Re Marriage of Foley, 84 Wn. App. 839, 930 P.2d 929 (1997). Mr. Carlson's argument also ignores on this point as well as in the remainder of his arguments the impact of the separate property he received in the divorce which also supported a disproportionate award of property in favor of Mrs. Carlson.

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3. The Fees And Costs Were Also Properly Based on RCW 26.09.140.

The Findings of Fact and Conclusions of Law also based the fee and cost award on RCW 26.09.140. Paragraph 2.15 contains the findings that:

The Petitioner has the need for the payment of fees and costs and the Respondent has the ability to pay these fees and costs. The Petitioner has incurred reasonable attorneys' fees and costs in the amount of \$50,000.00... CP at 1309.

This is the statutory criteria for fees under RCW 26.09.140 which allows reasonable fees and costs on consideration of the financial resources of both parties. Mr. Carlson has not challenged the award of fees under RCW 26.09.140 and his contention that intransigence was the only basis for the award is simply incorrect.

V. ARGUMENTS IN RESPONSE TO APPEAL OF HMD LIMITED PARTNERSHIP.

A. THE CLAIMED LOANS FROM 2003, 2007 and 2009 WERE PROPERLY DISMISSED UNDER THE APPLICABLE THREE YEAR STATUTE OF LIMITATIONS.

None of these alleged liabilities were documented by any written promise to pay. All of the claimed loans prior to 2012 required testimony from Mr. Carlson and others to even assert the claim. While Mr. Carlson claimed that money came from HMD it was also clear that he lost everything to creditors in 2002 and filed bankruptcy in 2006. RP at 161, 354. Mrs. Carlson testified that Mr. Carlson took all the money from South 80 Orchards starting in 2011. RP at 2.

For the claimed loans of 2003 and 2007 the Trial Court saw transfers of money but found no promises to pay, no terms indicated by any of the documents submitted by HMD and were based only on testimony from Mr. Carlson well after the alleged events. The Trial Court determined that a three year statute of limitations applied which precluded the claims. CP at 292:1-13.

For the claimed loans in 2009 the only notation in the bookkeeping records "N/P S-80" which it determined to mean "note payable South 80". however, there were no other entries, or other terms described and no promises to pay. CP at 292:14-21. To this alleged obligation the Trial Court again properly applied a three year statute of

limitation. CP at 292:21. The Trial Court found that Mr. Carlson was fully aware of what was going on. CP at 294.

Under RCW 4.16.080(2) a three year statute of limitations applies to actions on liabilities which are not in writing and do not arise out of a written agreement. If parol evidence is necessary to establish any material element of a contract, then the contract is partly oral and the three-year statute of limitations applies, rather than the six-year statute of limitations. DePhillips v. Zolt Const. Co., Inc. 136 Wn.2d 26, 959 P.2d 1104 (1998). It has been a long standing rule that an account is not a contract in writing and is subject to the three year statute of limitations. Hamlin v. Flick 130 Wn. 126, 226 P. 484 (1924).

HMD then argues that the three year statute of limitations should not run against Mrs. Carlson because she was a fiduciary and breached her fiduciary duties. This argument fails because the Trial Court determined that Mr. Carlson was fully aware of what was going on and the court rejected that argument. CP at 248,294:10-11. In addition the Trial Court specifically found Mrs. Carlson did not act in a fiduciary capacity and did not violate any fiduciary duties. CP at

295:7-10. There was never any proof offered that Mrs. Carlson was actually the one who loaned or borrowed the money or acted with respect to any loans as a fiduciary. Depending on which set of HMD documents Mr. Carlson would attempt to rely on, (the original documents or the ones he fraudulently altered), he was either a co-general partner as the personal representative of the Estate of Hugh A. Carlson or the general partner of HMD. Exhibits PE 15, 15A.

More importantly, HMD has not assigned any assignment of error whatsoever to the Trial Court's finding that Mrs. Carlson did not violate any fiduciary duties. This finding is unchallenged. It is therefore a verity on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801, 808, 828 P.2d 549, 553, 1992 WL 74359 (1992) In addition, HMD never even asserted any claim for breach of fiduciary duty against Mrs. Carlson which pertained to any of the alleged loan transactions. Their sole claim for breach of fiduciary duty centered on the removal of specific funds in the amount of \$226,485.05 from a specific bank account which she deposited with the registry of the Court. CP at 1643. The claim of HMD regarding loans were solely asserted against South 80 Orchards as a breach of contract claim. CP

at 1646-1647. HMD cannot raise for the first time in an appeal brief a claim which they never even included in any complaint. HMD's arguments in this vein are patently frivolous.

HMD next argues that the debts to HMD should be reaffirmed solely based on the testimony and claim of Mr. Carlson that they are owed. This obviously self-serving testimony made by Mr. Carlson after the date of separation is not the type of acknowledgement in writing contemplated by RCW 4.16.280. It would also be obvious that following separation Mr. Carlson could not create community liabilities. An acknowledgement of a debt will only take an action out of the statute of limitations where it is not coupled with any refusal to pay or circumstances defeating the inference of an intent to pay. In Re Tragopan Properties, LLC, 164 Wn. App. 268, 263 P.3d 613(2011). The context of this divorce was Mr. Carlson was claiming the debt is owed, and Mrs. Carlson is claiming there is no debt owed, and there was no effort to collect the money. CP at 295.

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B. THE COURT DID NOT CONFUSE THE ISSUES BETWEEN THE TWO CASES. THE CASES WERE CONSOLIDATED BY AGREEMENT BECAUSE THE ISSUES WERE INEXTRICABLE.

Here Mr. Carlson is really complaining about a result for which he can show no abuse of discretion because the process was invited. HMD cannot complain about the consolidation of the cases when it was their motion and their agreed order that resulted in consolidation. CP at 1716. Mr. Carlson and HMD spend a great deal of effort pointing out that HMD had “other” limited partners and that the treatment of HMD in the property division was improper. However, it is also true that South 80 Orchards LLC had other members also. In a similar manner if there are other members of South 80 was it fair to count South 80 assets awarded to Mrs. Carlson at full value when she only owned a 65.4% interest in those assets. While this is an issue which Mrs. Carlson raises in her cross-appeal, Mr. Carlson who was awarded 100% of the remaining assets of HMD has no complaint because the Trial Court did not specifically factor at all the value of HMD in the division of community property. Reviewing the record as a whole the Trial Court clearly found that the Carlsons’

used both HMD and South 80 without regard to their entity status and that the Carlson's and particularly Mr. Carlson moved assets between the entities without much regard to either their corporate existence or other shareholders or limited partners in either entities. CP at 289-291, 294, 301. The Trial Court repeated a common theme throughout its rulings:

Again, as I said previously, the observation of the various corporate entities had been largely ignored throughout the marriage and each of the Carlsons had made a number of withdrawals from HMD for their corporate and mutual interests.

CP at 291:3-7.

The Trial Court actually did a remarkable job in dealing with all of the interrelated issues between all of the parties and entities. Because the issues involving HMD and South 80 were intertwined into the determination of a fair and equitable division of property which was appropriately described by the Trial Court as follows:

The, and the problem is that there are, the rules that govern the contractual issues, the business issues, are substantially different and certainly not as bound in equity as the, as the divorce

issues. One is more ridged, I would say; one is more flexible; one grinds against the other. I guess it's like having a disc in your back fixed. You tend to grind against each other and it, it damages the discs around it, but, uh, so what I have done is I have gone back and forth.

I have started with the contractual issues and worked through the divorce, went through the divorce and went backwards into the contractual issues, doing it both ways.

CP at 286. Regardless of the complexity the Court would ultimately have to allocate property and determine the issues between the parties and then allocate properties and liabilities in the divorce. Mr. Carlson and HMD can show no error in the consolidation that they requested.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING PREJUDGMENT INTEREST TO HMD BECAUSE THE CLAIM WAS NOT LIQUIDATED.

HMD complains the Trial Court did not apply pre-judgment interest to the amount of HMD funds which Mrs. Carlson deposited into the registry of the Court. The Trial Court determined Mrs. Carlson was justified in her effort to preserve the status quo. CP at 291. The standard of review here is not *denovo* except possibly with respect to the determination of whether a claim is liquidated or not. A decision

on whether or not to apply prejudgment interest is reviewable only for abuse of discretion. Appellate courts review a trial court's decision whether to award prejudgment interest on an abuse of discretion standard. Scoccolo Constr., Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). Further, appellate courts "review a trial court's award under RCW 4.84.185 for an abuse of discretion." Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 786, 275 P.3d 339 (2012). HMD can show no abuse of discretion.

However, the application of prejudgment interest should not have been applied in any event because HMD's claim to all or any portion of the \$226,485.05 deposited was clearly not liquidated. A trial court may only award prejudgment interest:

- (1) when an amount claimed is "liquidated" or
- (2) when the amount of an "unliquidated" claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.

Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968) (citation omitted) (emphasis added). See also Aker Verdal A/S

v. Neil F. Lampson, Inc., 65 Wn. App. 177, 189, 828 P.2d 610 (1992) (“Thus, prejudgment interest may not be awarded when the damages are unliquidated.”).

Here the right to the \$226,485.00 was not liquidated. This was also clearly demonstrated when Mrs. Carlson was ultimately awarded \$65,000.00 from HMD to be paid from those funds. The claim of HMD with regards to those funds was not liquidated because during the trial the Trial Court had to first determine what the value of Mrs. Carlson’s interest in HMD was before determining whether HMD was entitled to any of those funds or whether Mrs. Carlson was entitled to those funds or more or less. This required testimony at trial because the value of HMD was not determined until the Trial Court ruled that Mrs. Carlson’s interest at 6.5% was worth \$65,000.00. CP at 288:3 This was based on Mr. Carlson’s testimony at trial that HMD was worth between \$1,000,000.00 - \$1,250,000.00. RP at 677, 605. In fact, as stated in her cross-appeal there was in fact no basis for any prejudgment interest including the \$3,648.56 which the Trial Court determined should be deducted from her \$65,000.00 payout.

D. THE TRIAL COURT DID NOT ERR IN DETERMINING MRS. CARLSON'S 6.5% INTEREST IN HMD WAS WORTH \$65,000.00 BECAUSE THAT WAS BASED ON MR. CARLSON'S TESTIMONY THAT HMD WAS WORTH \$1,000,000.00 - \$1,250,000.00.

The Trial Court based the value of Mrs. Carlson's 6.5% interest in HMD on the testimony of Mr. Carlson which indicated that HMD had a value of \$1,000,000.00 - \$1,250,000.00. RP at 677, 605. Mr. Carlson and HMD have nothing to complain about here since they established this value. Thus, the Trial Court properly valued Mrs. Carlson's 6.5% interest at \$65,000.00 (obviously being exactly 6.5% of \$1,000,000.00).

VI. ARGUMENTS PERTAINING TO THE CROSS-APPEAL OF MARY CARLSON.

A. THE TRIAL COURT FAILED TO PROVIDE MRS. CARLSON WITH ADEQUATE MAINTENANCE.

The award of only three years maintenance in an amount which is only effectively \$2,000.00 per month to Mrs. Carlson in a 23 year marriage was wholly inadequate. Not only was it inadequate, but it shifted to her the tax consequences of an additional \$12,000.00 per year which provided her no actual support. The trial court has

discretion when awarding spousal maintenance, and the party who challenges a maintenance award or a property distribution must demonstrate that the trial court “manifestly abused its discretion,” which occurs when it does not base its award upon a fair consideration of the statutory factors. In Re Marriage of Marzetta 129 Wn. App. 607 (2005), 120 P.3d 75, review denied 157 Wn.2d 1009, 139 P.3d 349. In the case at bar, the length of marriage and needs of Mrs. Carlson were not adequately considered. Furthermore, there is no case or other legal precedent that Respondent could locate which would support that an insurance payment would constitute allocated maintenance in the manner ordered by the Trial Court. Instead the Trial Court should have provided Mrs. Carlson with longer term support of at least \$3,000.00 per month until at least her retirement age.

An award of maintenance until the age of retirement finds support in cases involving longer term marriages. In Re Marriage of Bulicek, 59 Wn. App. 630, 800 P. 2d 394 (1990); In Re Marriage of Williams, 84 Wn. App. 263, 927 P.2d 679, review denied, 131 Wn. 2d 1025 (1996).

B. THE TRIAL COURT ABUSED IT DISCRETION BY INCONSISTENTLY TREATING HMD LIMITED PARTNERSHIP AS THE SEPARATE PROPERTY OF MR CARLSON WHILE TREATING SOUTH 80 ORCHARDS LLC AS COMMUNITY PROPERTY AND MRS. CARLSON'S 6.5% INTEREST IN HMD AS COMMUNITY PROPERTY.

The Trial Court abused its discretion when it treated the same asset HMD Limited Partnership as separate property when awarding the balance to Mr. Carlson and as community property when awarding Mrs. Carlson \$65,000.00 in lieu of her 6.5% ownership interest. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In Re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). There could be no justifiable reason for treating the same asset differently for each spouse.

Either the Trial Court should have treated HMD Limited Partnership as community property or the \$65,000.00 amount awarded to Mrs. Carlson should have been treated as her separate property also. The HMD documents which established Mrs. Carlson's 6.5% interest in fact record it as her separate property. This error should be

corrected in one of two ways either by re-characterizing HMD as community property and then factoring it into the overall property division (in which case Mrs. Carlson should receive 55% of \$1,000,000.00 less the \$65,000.00 she was paid) or her \$65,000 should have been treated as separate property and treated consistently as Mr. Carlson's separate property which did not factor into the mathematical division of community property (in which case Mrs. Carlson should be awarded another \$65,000.00 in community property to make up the difference). It was likewise an abuse of discretion to treat HMD which had other limited partner owners differently that South 80 Orchard LLC which also had other member owners. The commingled nature of the businesses of both HMD and South 80 should not have been treated any differently. In fashioning the division of property in the dissolution which actually stripped from South 80 Orchards other members the 901 Orchard lease (which was awarded to Mr. Carlson) and all of the assets of South 80 which were awarded to Mrs. Carlson were valued at 100% instead of her actual ownership at 65.4% in those assets. Mrs. Carlson was actually awarded 34.6% less property. It was an abuse of

discretion to treat the similarly operated and commingled HMD differently than South 80.

To remedy this error the Trial Court should award Mrs. Carlson additional property to make up for the 34.6% deficiency or alternatively as indicated above the value of HMD should have been factored into the overall property division in order to justly and consistently treat those operating entities.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN TREATING THE DEBT OWED TO HMD AS A COMMUNITY LIABILITY RATHER THAN THE SEPARATE DEBT OF MR. CARLSON.

The Trial Court erred in treating the HMD debt as community debt and offsetting it against other community property awarded to Mr. Carlson. The net result was that Mrs. Carlson was unfairly deprived in a 55%/45% division of 55% of the value of that debt in terms of community property. Mr. Carlson admitted into evidence copies of the series of notes upon which the net debt amount was calculated. Exhibit RE 106. Every one of those notes was prepared and signed solely by Mr. Carlson both as payee and payor after the date of separation of July 2012. In addition to being

incredibly suspect, Mr. Carlson incurred those debts unilaterally and after the date of separation. They should have been characterized and treated as his separate property, RCW 26.16.140. The Trial Court should have not credited the amount of \$216,654.00 against the community property to be divided when calculating the property division. See CP at 302.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN DEDUCTING AN ALLOCATION OF PRE-JUDGMENT INTEREST FROM THE FUNDS SHE WAS AWARDED FOR HER \$65,000.00 INTEREST IN HMD.

This error and the legal standards for determining when a sum is liquidated is discussed in Section V (C) above. The amount of the bank account funds deposited with the registry of the court were not in fact liquidated because until the Trial Court determined the value of Mrs. Carlson 6.5% interest in HMD, the amount of those funds which belonged to HMD could not be determined. Therefore, it was an abuse of discretion to deduct from Mrs. Carlson's \$65,000.00 the pre-judgment interest amount. CP at 84, 316-317. To remedy this error HMD should be ordered to repay to Mrs. Carlson the interest amount deducted of \$3,648.56 together with interest.

E. THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES AND COSTS FOR MR. CARLSON'S INTRANSIGENCE WAS INSUFFICIENT.

The standards governing the award of attorneys' fees and costs are set forth in Section IV (F) above. While the determination of the amount of fees that should have been awarded for intransigence rests with the discretion of the Trial Court, it was wholly insufficient and a manifest abuse of discretion to only award Mrs. Carlson approximately \$50,000.00 or one-third of the total amount of fees that she requested in the amount to \$148,000.00 plus the forensic accounting fees. This case patently demonstrated not just foot dragging but active document fraud, massive concealment of fruit proceeds, improper diversion of funds to develop new orchards and the attempt to further conceal proceeds by prepayment of expenses which involved millions of dollars. To remedy the extraordinary burden placed on Mrs. Carlson to protect her right to a fair and equitable division when the deck was being stacked against her in so many ways requires an that additional attorneys' fees and costs be awarded.

F. IN ADDITION, MRS. CARLSON SHOULD BE AWARDED ADDITIONAL ATTORNEYS' FEES ON APPEAL.

Mrs. Carlson should be awarded her attorneys' fees on appeal both on the grounds of RCW 26.09.140 and also on the grounds that Mr. Carlson and HMD which he controls continues to be intransigent. RAP 18.1. Mr. Carlson and HMD seek to essentially re-litigate this case and have presented no legal issues to this Court and only unsubstantiated complaints that the Trial Court abused its discretion.

G. THE TRIAL COURT ABUSED ITS DISCRETION IN THE ALLOCATION OF FARMING PROPERTIES WHEN MR. CARLSON WAS AWARDED ALL OF THE OWNED PROPERTY, ALL OF THE RESIDENCES AND ALL SHOPS.

The Trial Court intended to divide farming properties to allow Mr. and Mrs. Carlson to conduct farming activities. In doing so the Trial Court allocated to Mrs. Carlson only three leased Indian Trust properties known as the 902, 903 and 941. Mrs. Carlson was not allocated any community property that was owned in fee. Mrs. Carlson was not allocated any property on which there was a useable residence or a shop for farm equipment. Mr. Carlson was allocated all of the

properties with houses and shops. In making a fair and equitable distribution the paramount concern is the economic circumstances of the parties. RCW 26.09.070. The trial court's paramount concern when distributing property in a dissolution proceeding is the economic condition in which the Decree leaves the parties. In Re Marriage of Williams, 84 Wn. App. 263, 927 P.2d 679, review denied 131 Wn.2d 1025, 937 P.2d 1102 (1996). The Trial Court abused its discretion in this regard in failing to award Mrs. Carlson any farming residences or shops to store her equipment. To remedy this error, Mrs. Carlson would request that the Court be directed to re-allocate the property division and award her the Homeplace property so that she has both a residence and a shop for her farming operations.

VII. CONCLUSION

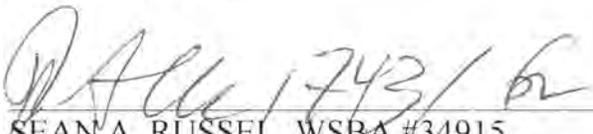
This Court should deny the appeal and relief requested by Appellants Hugh David Carlson and HMD Limited Partnership and in response grant the Respondent/ Cross – Appellant her attorneys' fees and costs incurred herein.

This Court should grant the appeal and relief requested by Cross-Appellant Mary Carlson and grant her additional spousal support and a fair and equitable division of community and separate property which includes the value of HMD Limited Partnership, accounts for the fact that she only has a 65.4% ownership interest in the South 80 Orchards with minority members, re-characterize the HMD loan amount as Mr. Carlson's separate property, and grant her farming assets which include a house and farming shop, as well as her attorneys' fees and costs on appeal.

Respectively submitted this 21st day of September, 2017.



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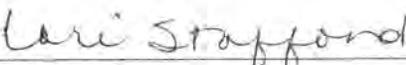
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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused a copy of this document to be sent to the following:

ATTORNEY FOR HUGH DAVID CARLSON; HMD LIMITED PARTNERSHIP: R. Bruce Johnston Johnston Jacobowitz & Arnold, PC 2701 First Ave., Ste 340 Seattle, WA 98121	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail
ATTORNEY FOR SOUTH 80 ORCHARDS: Sean A. Russel Stokes Lawrence Velikanje Moore & Shore 120 N. Naches Ave. Yakima, WA 98902	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail
ORIGINAL AND ONE COPY TO: Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	<input checked="" type="checkbox"/> UPS Next Day Air

Executed this 22nd day of September, 2017, at Yakima, Washington.


Lori Stafford