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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
REPLY BRIEF

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STATUTES AND RULES

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I. INTRODUCTION.

This is the Reply Brief of Respondent Mary Carlson to Hugh David Carlson's response brief to Mrs. Carlson's cross-appeal; Mr. Carlson's arguments are addressed by Mrs. Carlson in corresponding order below. Mr. Carlson's response begins at page 16 of the Reply and Respondent's Brief of Appellant and Cross Respondent Hugh David Carlson.

II. ARGUMENTS IN REPLY TO RESPONSE 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 TRIAL COURT ERRED IN AWARDING
INADEQUATE MAINTENANCE GIVEN THE
ECONOMIC CIRCUMSTANCES OF MRS.
CARLSON.**

The court did not adequately consider the statutory factors for the length of the marriage and the needs of the party receiving maintenance. The needs of Mrs. Carlson were not adequately considered when the court allowed for \$1,000 of the \$3,000 maintenance payment to go toward the payment of life insurance policies. There is no case or other authority to support such structure of payments in the manner ordered by the trial court for only three

years. Mrs. Carlson is paying the full amount for the life insurance premium yet she was awarded a mere 50% of the death benefit.

However, there is plenty of authority to support the argument that in long term marriages such as this one, awarding maintenance until the age of retirement is appropriate. 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).

The amount of maintenance was inadequate considering that she only earned \$500-\$850 per month and was not eligible for social security. RP at 4. Additionally, Mrs. Carlson was not awarded any property with a residence so her maintenance was offset by the cost of her rent and other debt she incurred. Exhibit PE 5. RP at 9. Her monthly expenses exceeded the amount of maintenance she received. Id. In contrast to Mrs. Carlson, Mr. Carlson's monthly income was abundant. 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. In addition, Mr. Carlson was able to draw income from farming of at least \$1,237.90 per week. CP at 280. Mr. Carlson had the

ability to pay and Mrs. Carlson had corresponding need of at least \$3,000 per month.

Three years of maintenance at the effective rate of \$2,000 per month from a marriage that lasted 23 years was an abuse of discretion and should be reversed.

C. THE TRIAL COURT ERRED IN CHARACTERIZING MRS. CARLSON'S INTEREST IN HMD AS COMMUNITY PROPERTY.

The Trial Court abused its discretion when it treated HMD Limited Partnership as separate property when awarding the balance to Mr. Carlson and then as community property when awarding Mrs. Carlson \$65,000.00 in lieu of her 6.5% ownership interest. That asset should have been treated the same for both spouses especially given the fact that the court found that HMD was essentially a "piggy bank" in that money was constantly moving back and forth for the community's benefit. CP at 294.

This error should be corrected either by re-characterizing HMD as community property and then factoring it into the overall property division (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. Under that alternative, Mrs. Carlson should be awarded an additional \$65,000.

It was also an abuse of discretion to treat HMD differently than South 80 Orchard LLC where both entities had other member owners. All of the assets of South 80 awarded to Mrs. Carlson were valued at 100% instead of her actual ownership at 65.4% of those assets. The remainder of South 80 was owned by other persons who were not parties. RP at 160. From that perspective, 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, this Court should award Mrs. Carlson additional property to make up for this deficiency or alternatively the value of HMD should have been factored into the overall property division in order to justly and consistently treat those operating entities.

**D. THE TRIAL COURT ERRED IN
CHARACTERIZING POST SEPARATION DEBT
OF HMD AS COMMUNITY PROPERTY**

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's share of the community property was diminished by the imposition of the community debt. Mr. Carlson admitted into evidence a 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 payer 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.

The Trial Court even commented on the apparent lack of credibility of these loans when it discussed the crop proceeds Mr. Carlson had hidden at Borton Fruit:

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.

The debt should have been treated as his separate property under RCW 26.16.140. That statute states that when spouses are living separate and apart, their respective earnings and **accumulations** are separate property. Here, Mr. Carlson's debts incurred while separate and apart from Mrs. Carlson qualify as debt accumulations that are his separate obligations.

That debts incurred during separation can also be considered separate "accumulations" is discussed in, Oil Heat Co. of Port Angeles v. Sweeney, 26 Wash. App. 351, 353-54, 613 P.2d 169, 171 (1980), in which the court is examining the issue of liabilities incurred after separation:

“When no community exists to incur liability because the parties are living separate and apart, the presumption may be overcome as community liability ordinarily will not attach to a marriage that is clearly defunct. Dizard & Getty v. Damson, 63 Wash.2d 526, 528-29, 387 P.2d 964 (1964); Cross, The Community Property Law in Washington, 49 Wash.L.Rev. 729, 829 (1974). However, mere physical separation of the parties does not establish that they are living separate and apart sufficiently to negate the existence of a community. Kerr v. Cochran, 65 Wash.2d 211, 224, 396 P.2d 642 (1964); Rustad v. Rustad, 61 Wash.2d 176, 180 377 P.2d 414 (1963). See also Campbell v. Sandy, 190 Wash. 528, 69 P.2d 808 (1937).”

Oil Heat Co. of Port Angeles v. Sweeney, 26 Wash. App. 351, 353–54, 613 P.2d 169, 171 (1980).

In the present case, the spouses were living separate and apart at the time the debts were incurred. They were in the throes of divorce proceedings and the marriage was over for all intents and purposes. The presumption that the debt was a community debt is overcome by the basic facts of this case. The Trial Court erred in crediting the amount of \$216,654.00 against the community property to be divided when calculating the property division. See CP at 302.

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**E. THE MONEY PLACED INTO THE COURT'S
REGISTRY WAS NOT LIQUIDATED BECAUSE
THE AMOUNT BELONGING TO HMD OR MRS.
CARLSON WAS UNKNOWN UNTIL THE VALUE
OF MRS. CARLSON'S INTEREST IN HMD WAS
DETERMINED.**

The bank account funds deposited with the registry of the court were not 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. Mr. Carlson's response takes the position that because the funds were a known amount, they were therefore liquidated. Cross Resp. Br. 19. Such a position ignores the reality that some unknown portion of that money would have been deducted and given back to Mrs. Carlson for her 6.5% interest that Mr. Carlson tried unsuccessfully to eliminate through fraudulent conduct in the alteration of HMD business records. In addition, the court did not even decide the character of those funds until the final ruling.

It was an abuse of discretion for the Trial Court to deduct from Mrs. Carlson's \$65,000.00 the pre-judgment interest amount. CP

at 84, 316-317. HMD should be ordered to repay to Mrs. Carlson the interest amount deducted of \$3,648.56 together with interest.

**F. THE TRIAL COURT ERRED IN LIMITING
ATTORNEY'S FEES.**

As stated in Mrs. Carlson's response, the determination of the amount of fees 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—a mere third of the total requested fees of \$148,000.00 plus the forensic accounting fees. Mr. Carlson's proven intransigence involved almost every option at his disposal to deny Mrs. Carlson her right to a fair and equitable distribution. His intransigent efforts involved 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. CP at 305-309.

Without the work of Mrs. Carlson's attorney and experts, this case would not be as complex as it was unfortunately made by Mr. Carlson's intransigence.

To remedy the nearly insurmountable burden placed on Mrs. Carlson to protect her right to a fair and equitable division requires that additional attorney's fees and costs be awarded.

1. Mr. Carlson's intransigence cannot be debated.

The Trial Court's discussion of this subject 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 expenses. 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.

In Mr. Carlson's brief, he seeks to place blame on Mrs. Carlson for behavior that "could easily be characterized as intransigent". Cross Resp. Br. 19. Nothing in the Trial Court's oral ruling found that Mrs. Carlson engaged in intransigent conduct. CP 286:10-13; CP 309:10-11.

2. The amount of fees should be enhanced 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.

RCW 26.09.140 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 incorrect. Mr. Carlson has the ability to pay and Mrs. Carlson has the corresponding need. The amount of fees should be increased to reflect both the intransigence and to account for Mrs. Carlson's need under RCW 26.09.140.

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G. THE TRIAL COURT ERRED IN THE ALLOCATION OF FARMING PROPERTIES WHERE 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. Mrs. Carlson was allocated only three leased Indian Trust properties known as the 902, 903 and 941 none of which are owned in fee. Mrs. Carlson was not allocated any property with a home or adequate storage for farm equipment. In Mr. Carlson's response, he states that Mrs. Carlson is wrong about the features of some of the properties in that one has a covered storage area. Cross Resp. Br. 23. The existence of a covered storage area is not important as to this issue. It is common sense that farming requires a lot of equipment and a lot of storage space. Storage space needs to be in the nature of a shop or other structure that can be sealed to prevent theft or other damage. As it stands, Mrs. Carlson has no place to safely store her farm equipment and will have to rely paying another land owner to safely store equipment.

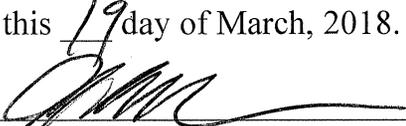
Mrs. Carlson was not awarded any property with a residence. The paramount concern of equitable distribution is the economic circumstances of the parties. RCW 26.09.070. Mr. Carlson was awarded the Homeplace and Sno Valley ranches, both of which had residences. RP at 23, 26-27. The trial court's paramount 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. Both spouses were supposed to be able to continue farming. Mrs. Carlson requests 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.

III. CONCLUSION

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

This Court should grant Mary Carlson appeal for 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, grant her farming assets which include a house and farming shop as well as additional attorneys' fees for work up to and during trial and for attorney's fees on appeal.

Respectively submitted this 19 day of March, 2018.



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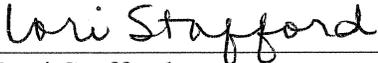
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CERTIFICATE OF TRANSMITTAL

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:

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<p>ATTORNEY FOR SOUTH 80 ORCHARDS:</p> <p>Sean A. Russel Stokes Lawrence Velikanje Moore & Shore 120 N. Naches Ave. Yakima, WA 98902</p>	<p><input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail</p>

Executed this 19th day of March, 2018, at Yakima, Washington.



Lori Stafford

MEYER, FLUEGGE & TENNEY

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