

FILED  
Court of Appeals  
Division III  
State of Washington  
3/2/2020 11:57 AM  
NO. 368424

COURT OF APPELLS, DIVISION III  
STATE OF WASHINGTON

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MATTHEW E. WILCOX,  
Respondent,  
V.  
MARINA PALOMAREZ,  
(fka WILCOX)  
Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY  
15-3-00807-5

---

AMENDED  
BRIEF OF RESPONDENT  
MATTHEW E. WILCOX

CHRIS TAIT  
ATTORNEY FOR  
RESPONDENT  
WSBA 6104

[1]

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## INTRODUCTION

After a four (4) day trial and the admission of hundreds of exhibits, the trial court ruled upon the division of property including the family home and the business operated by the Respondent, allocation of debt, Spousal Maintenance, attorney fees, an award of personal property and other issues.

The Petitioner/Appellant brought this appeal claiming an abuse of discretion by the trial court on a number of issues.

The Respondent now answers.

## ASSIGNMENTS OF ERROR

- 1) The trial court erred, and/or abused its discretion with respect to the business valuation as follows:
  - a. The trial court utilized the fair market value approach to business valuation. The trial court should have utilized the asset approach.

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- b. The trial court adopted a valuation based upon EBITDA, which is Earnings Before Interest, Depreciation and Amortization.
  - c. The trial court found that a debt due to Respondent's mother was \$250,000.00. The trial court should have found that at separation that debt existed in the sum of \$300,000.00. Finding that only \$250,000.00 existed was error, and/or an abuse of discretion.
  - d. In valuing the business at \$500,000.00 the trial court erred and/or abused its discretion by failing to account for the debt shown above in valuing the business. IF the business is valued at \$500,000.00, then its net value after accounting for the debt found to exist in the sum of \$300,000.00 is \$200,000.00.
- 2) The trial court erred, and/or abused its discretion in awarding Spousal Maintenance to the Wife for a period of approximately 25 years, assuming Respondent lives long enough.

- 3) The trial court erred, and/or abused its discretion in finding that the Wife had a need for Spousal Maintenance for that long a time period, given the nature and extent of property awarded to her, including but not limited to a debt-free home, a debt-free vehicle, no consumer debt except that incurred by her after separation, and other assets as well.

### **REQUEST FOR ORAL ARGUMENT**

The Respondent respectfully requests that oral argument on these issues be allowed at a date, time and place set by this court.

### **ISSUES**

- 1) Did the trial court abuse its discretion in awarding Spousal Maintenance?
- 2) Did the trial court abuse its discretion in discretion in distributing property and allocating debt?
- 3) Has the Appellant met her burden in proving an abuse of discretion?

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- 4) Are the findings of the trial court supported by substantial evidence?
- 5) Should attorney fees be awarded on appeal?

### COUNTER STATEMENT OF THE CASE

This matter was filed on August 6, 2015. (RP 219 L23)

Approximately 42 months passed between the filing date and the first day of trial on January 22, 2018. During that period of time, the Petitioner had access to over \$207,000.00. (RP 231 L20-24) That sum did not include funds she received and used to pay the mortgage on the family home down to a zero balance. (RP 175 L13) The first mortgage, with monthly payments of approximately \$1,350.00 per month, on the family home was paid in full on or about June 2018. (RP231 L20-24) That sum, over \$200,000.00, included her wages-when she was working, funds she withdrew at the time of separation without notice to the Respondent, child support received from the Respondent, Spousal Maintenance received from the Respondent, use of a gas card paid by the Respondent, and cell phone usage paid by the Respondent. (RP 231 L11-19). On separation in

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early July 2015, the first mortgage balance on the family home was approximately \$34,000.00. (RP 175 L13) That first mortgage was paid off in June, 2018. (RP 223 L15-19) After the first mortgage was paid off in June, 2018 the Petitioner continued to receive Spousal Maintenance in the sum of \$2,500 per month until trial. (RP 223 L19) For the 7 months that passed after the first mortgage was paid off until the time of trial, the Petitioner received approximately \$2,500.00 per month in Spousal Maintenance, plus her wages with no house payment, no car payment, and no consumer debt except that which she incurred after separation. (RP 441 L12-22) At separation, the Petitioner had no consumer debt. (RP 441 L23-25, 442 L1-4)The second mortgage on the family home was sometimes referred to as a “line of credit.” The original balance on that loan was \$25,000.00. (RP 442 L11-13) At the time of trial, the balance on that loan was \$20,086.00. In compliance with the ruling by the trial court, the Respondent has paid that second mortgage or “line of credit” to zero.

Against that backdrop, it was not an abuse of discretion to award Spousal Maintenance payable to Petitioner in the sum of \$1,000.00 per

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month, plus the respondents pension beginning in December 2022 until his death.

Having received, taken and/or had access to over \$200,000.00 during the pendency of this matter, the Petitioner testified that what she had to show for that sum was a mattress, some makeup removers, and a mixer. (RP 393, 394)

The family home was purchased in 1996. \$20,000.00 of the down payment came from the sale of a home in Duvall, Washington that was Respondent's separate property, owned before marriage. (RP 217 L24) On cross examination, the Petitioner was asked about that transaction, and whether the \$20,000.00 down payment came from the sale of Respondent's separate property. The Petitioner answered "I don't know." (RP 222 L21)

The Petitioner's lifestyle was not impacted by these proceedings. She lived in the family home before filing, and she lived there at trial. (RP 166, 397) With very few exceptions, and no exceptions of any financial magnitude, she had and still has almost all the personal

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property. (RP 224) She had and still has a 2013 Honda sedan in very good condition. That vehicle was debt-free at filing. (RP 224, 398)

The Respondent's lifestyle changed dramatically. He went from living in the family home to a rented apartment with hardly any furniture and/or appliances. (RP 445 L1-5)

### **BUSINESS VALUATION**

The parties purchased what is now known as Premier Power Sports in November 2008. The Petitioner had very little involvement in the dealership. A long-time employee, Kevin Murray, testified that the Petitioner performed, at most, one percent of the total work done at the dealership since it opened. The Petitioner was not involved in sales, parts, service or any other aspect of the business. The business does not own real property. The business is conducted in a rented building. The purchase price was \$400,000.00. No down payment was made. The sum of \$100,000.00 was borrowed from William Funkhouser, who owns the building in which the business is operated. The debt to him was paid within 4-5 years of the purchase. The sum of \$300,000.00 was borrowed from the Respondent's mother, Kathy Hosack. Ms. Hosack testified that it

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was an advance on Respondent's inheritance, and it was not a gift. Prior to trial, two payments were made by Respondent to his mother in the sum of \$25,000.00 in each payment. At trial, the debt to Respondent's mother, Kathy Hosack, was \$250,000.00. Respondent had paid "interest only" payments on this debt from the time the funds were advanced to Respondent to buy the business. The trial court assigned all of that debt in the sum of \$250,000.00 to Respondent.

The trial court treated the dealership as a community asset. It was valued at \$500,000.00.

No part of the debt to Ms. Hosack in the sum of \$250,000.00 was assigned or allocated to Petitioner.

The Petitioner's expert witness, Scott Martin, used a fair market value approach, even though neither party ever contended or argued that Premier Power Sports was or would be for sale. Such an approach looks at the sales price of similar businesses, or "comparables" or "comps." One of his "comps" was a business in Florida, and another was a Ducati dealership in Seattle that enjoyed gross annual revenue of

\$13,000,000.00. The Respondent's expert witness, Sue Price-Scott, used

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the asset approach also known as “fair value” which is the value to the current owner in its current location. She used the asset approach, or asset method of valuation. The trial court found that at the time of trial, a debt, payable to Kathryn Hosack, existed in the sum of \$250,000.00. That balance was accurate as of the summer of 2017, two years after separation. At separation, that balance was \$300,000.00. The Petitioner’s valuation, provided by Mr. Martin, did not treat or account for that long term debt. He arrived at his opinion as if that debt did not exist. Ms. Price-Scott treated and accounted for that debt, because it existed and was unpaid.

If we now ignore the fact that the debt structure set by the trial court was inaccurate at \$250,000.00, and subtract the actual debt found by the trial court from the value set by the trial court, then the division of assets would be:

<b>Total assets</b>		<b><u>Totals</u></b>	Matt	Marina
Premier Power	Does not			
Sports, LLC	include the	500,000.00	500,000.00	-

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debt - see

Exhibit 53.44

Bank Accounts

31,600.00	15,800.00	15,800.00
-----------	-----------	-----------

Escrow refund

-split equally	986.00	493.00	493.00
----------------	--------	--------	--------

Duvall house

20,000.00	20,000.00	-
-----------	-----------	---

Family home

225,000.00	-	225,000.00
------------	---	------------

Graham 401k

114,307.00	-	114,307.00
------------	---	------------

Fair Rental

Value of	42,000.00	-	42,000.00
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Family Home

2013 Honda

Accord	22,000.00	-	22,000.00
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Morgan Stanley account	17,424.00	-	17,424.00
Home furnishings	6,000.00	-	6,000.00
WA State Ret Savings Plan	3,185.00	-	3,185.00
<b>Total</b>	<hr/>	<hr/>	<hr/>
<b>Assets</b>	982,502.00	536,293.00	446,209.00

US Bank LOC Debt -			
Matt will pay but Marina reimbursed for half	(20,086.00)	(20,086.00)	-
Marina's reimbursement for half of US Bank debt	-	10,043.00	(10,043.00)
Debt to			

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Kathryn	(300,000.00)	(300,000.00)	-
Hosack			
Attorney fees			
	(77,219.00)	(77,219.00)	-
Home			
Mortgage	(35,000.00)	-	(35,000.00)
1/2 of fair			
rental of	-	3,500.00	(3,500.00)
family home			
	_____	_____	_____
	550,197.00	152,531.00	397,666.00
	=====	=====	=====

Mr. Martin observed, correctly, that the business was purchased for \$400,000.00 in 2008. He then went on to testify that it did not make intuitive sense that the business lost value down to \$335,000.00 as opined by Ms. Price-Scott. What he missed was the fact that at purchase of this community asset, against which a community debt existed at separation in

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the sum of \$300,000.00 and against which the trial court found that \$250,000.00 existed at the time of trial, the community had equity of zero because all the purchase price was borrowed money. Ms. Price-Scott testified that using the “fair value” approach, the community equity was \$335,000.00.

If the trial court had adopted the Respondent’s expert’s opinion, then the Petitioner’s share of equity at purchase was zero, and seven (7) years later her share of equity in that asset alone had grown to \$167,500.00. She realized that gain in net equity by doing no work, assembling no units, and incurring no liability on dealer agreements. The difference in expert testimony was and is that the Respondent’s expert, Ms. Price-Scott, treated and accounted for the debt to Ms. Hosack. The Petitioner’s expert, Mr. Martin, did not. The trial court observed that the debt had been or was taken into account, but the trial court did not ever account for or take into account the debt that it found existed at trial in the sum of \$250,000.00.

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The Respondent's position is and has always been that the debt exists, and must be paid, and therefore must be accounted for and taken into account in valuing the business.

When Mr. Martin, the expert called by the Petitioner, used the asset approach, which accounted for the debt which did exist and which was found by the trial court to exist, his valuation of Premier Power Sports was \$372, 000.00. That was only \$37,000.00 more than the valuation found by Ms. Price-Scott, called by the Respondent. (RP 108, 109) Mr. Martin recognized that at purchase these parties had zero equity. (RP 106) The asset approach accounts for the debt due to Ms. Hosack, and EBITDA, and/or adjusted EBITDA, does not.

The trial court found that comparing Premier Power Sports with a distributorship out of Florida was really like comparing "apples with oranges."

The trial court adopted his methodology, despite its shortcomings. His testimony, summarized at (RP 61-75) utilized a concept called EBITDA. This is Adjusted Earnings before taxes, interest, depreciation and amortization. EBITDA:

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- 1) Is a selective earnings metric used to predict a company's financial performance. It includes the use of a multiplier that is subjectively selected.
- 2) Is an indicator of how attractive the company is in terms of being a leveraged buyout candidate for potential investors. There was no evidence here that Premier Power Sports was or is for sale, and/or that it was or is attractive for potential investors.
- 3) Is thought to predict the ability of a business entity to carry or service its debt. Can the business pay the monthly payments? It does not predict or account for the ability of the business to pay the debt off, or when, or with what.
- 4) Does not distinguish between a large amount of debt on which a low interest rate is charged, or a small amount of debt on which a high interest rate is charged. It does not distinguish between a debt that cannot and will not be paid off for quite a number of years from a debt with a low balance that can and will be paid off in a matter of months. It can be used to mask or hide poor business decisions.

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- 5) When a business is sold its debt is not transferred to the buyer.
- How the business is financed currently is not always an important metric. Some buyers may be more concerned with intangible assets such as customers and performance than in the condition of existing equipment and the debt structure of the seller.
- 6) Takes depreciation into account, but only imprecisely because for example, if the business owns 20 trucks and each truck is 15 years old and each truck has over 200,000 miles on the odometer, the metric does not and cannot distinguish between that scenario— with very little useful life remaining-- and a different scenario in which the business owns only 5 trucks with only 5,000 miles on each odometer.
- 7) EBITDA is a measure of financial performance which may include the service of debt since it adds interest back in but it does not define the amount of debt within the organization. Nor does it account for how the principal of that debt will be serviced, or when or how it will be paid.

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- 8) If the business was sold per Scott Martin's "Fair Market Value" approach, the debt would not transfer to the new owner.

**SPOUSAL MAINTENANCE WAS ORDERED HEREIN AS FOLLOWS:**

- 1) \$97,000.00 through trial in late January 2019; (this figure is rounded down slightly for ease of computation)
- 2) \$47,000.00 from February 2019 through and including December 2022;
- 3) \$18,000.00 in gas cards and cell phone bills for 36 months before trial; (accurate summary without submitting every phone bill and every gas bill; includes a few vehicle maintenance items;)
- 4) \$114,000.00 commencing in January 2023 until the Respondent dies; (estimate of \$500.00 per month based upon an estimate of Respondent's life expectancy; not precise;

A total of \$276,000.00 as shown above. This assumes and/or includes and excludes as follows:

- 1) The Petitioner/Appellant outlives the Respondent.
- 2) The Petitioner/Appellant does not remarry.

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- 3) The sum of \$27,376.00 as is paid by Respondent to the attorney for Petitioner/Appellant after trial and ending in December 2019;
- 4) The pension from Respondent's former employment at Graham Packaging pays a benefit of at least \$500.00 per month commencing in January 2023 and continues until the Respondent reaches the age of approximately 74. 100% of that benefit, whatever it is, even if it is greater or lesser than this estimate of \$500.00 per month, goes to Petitioner/Appellant. No evidence was submitted as to the expected amount of that pension fund. Respondent believes that such an estimate was unavailable at trial and is unavailable now. Against that backdrop, Respondent believes his estimate of \$500.00 per month, for a total payout to Petitioner/Appellant between January 2023 and 2041 when the Respondent reaches the age of 74 of \$114,000.00, is reasonable and conservative. This assumes the funds in that pension fund last until the Respondent reaches the age of 74.
- 5) This \$276,000.00 in Spousal Maintenance does not include:

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- a. Cash taken by Petitioner at separation in July 2015, approximately \$35,000.00;
- b. The sum of \$6,750.00 awarded to each party by agreement on sale of a recreational vehicle after separation and before trial;
- c. Wages earned by Petitioner at any time since 06-30-2015 and wages she will earn through and including November of 2032, when she will reach the age of 65; At \$2,000.00 per month, which is lower than her net wages at any time during the marriage, this amounts to approximately \$420,000.00. This assumes she never receives an increase in pay, and she never earns as much as she did during the marriage. This assumes she will not work one day beyond the age of 65.
- d. Child support paid to Petitioner/Appellant by Respondent;
- e. Post-secondary support paid by Respondent for their adult daughter, who will turn 23 years of age on 8/29/2020.

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- f. The family home valued at \$225,000.00 by the trial court.  
Debt free.
- g. A Honda vehicle valued by the trial court at \$22,000.00.  
Debt free.
- h. A retirement Fund accrued during the marriage valued by  
the trial court at \$114,307.00;
- i. Household furniture and furnishings and appliances valued  
by the trial court at \$6,000.00;
- j. A retirement account from Petitioner/Appellant's  
employment during the marriage valued by the trial court at  
\$3,185.00, awarded to her in its entirety.
- k. The sum of \$493.00 awarded to Petitioner/Appellant as her  
one-half share of the reserve account paid out when the first  
mortgage on the family home was reduced to zero in June  
of 2018.
- l. Social Security benefits the Petitioner/Appellant will  
receive after she reaches the age of 62 or 65 and before the  
Respondent reaches the age of 74. If her Social Security

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benefits are only \$1,000.00 per month during that period of 108 months, she will receive \$108,000.00 in Social Security benefits.

- m. Total \$ 694,511.00 without her wages after age 65 in the sum of \$420,000.

The FINANCIAL DECLARATION submitted by Petitioner, dated August 23, 2018, showed monthly payments to her attorney in the sum of \$1,000.00. If that was true, Petitioner would have paid at least \$24,500.00 to her attorney before the trial date. Instead, evidence at trial showed that she had paid a total of \$6,500.00 in 42 months. (RP 431-433) Included in that total payment was a payment in the sum of \$5,000.00 paid or on about the filing date in August 2015. That shows that in the 42 months that followed, the Petitioner paid a total of \$1,500.00 to her attorney, having advised the court under penalty of perjury that she was paying him \$1,000.00 per month. That obvious intentional effort to mislead the court about payments being made probably contributed the finding of the trial court that she lacked credibility. (RP 431-433)

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After adjustments, the Respondent was ordered to pay \$27,376.00 in attorney fees to Petitioner's counsel, payable at \$3,000.00 per month. In compliance with the order, the Respondent timely paid that sum to Petitioner's counsel. Neither the Respondent nor his counsel are aware of any complaint made by Petitioner about the payment—through and including February 2020—of Spousal Maintenance, and/or the payment of \$27,376.00 to Petitioner's counsel after trial, for a total cash outlay after trial in the sum of \$40,376.00.

#### **FAMILY HOME PURCHASE**

The Petitioner/Appellant didn't know the source of the down payment for the family home. (RP 222)

She didn't know:

- 1) What personal property in the family home she kept; (RP 224, 235)
- 2) Whether the Respondent was claiming any credit for the \$20,000.00 down payment on the family home;( RP 235)
- 3) Why her job at Orthopedics Northwest came to an end; (RP 225)
- 4) How much she collected in unemployment benefits; (RP 226)

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- 5) How much credit card debt she had at separation; (RP 229)
- 6) How much she collected in child support and spousal maintenance; (RP 230, 231)
- 7) How much she collected in spousal maintenance; (RP 233)
- 8) How much she paid to her attorney during the seven months preceding trial; (RP 233)
- 9) When it was that her husband became interested in buying a motorcycle dealership; (RP 235)
- 10) Whether her mother-in-law was a teller of truths or a liar; (RP 237)
- 11) Whether her mother-in-law routinely lied to her over a period of years; (RP 237)
- 12) What the financing arrangements were with respect to the purchase of Yamaha Country in Kennewick; (RP 238)
- 13) How much of the purchase price for Premier Power Sports came from personal funds owned by the community; (RP 241)
- 14) Whether she was personally liable to pay Kawasaki for anything, including units purchased or units floored; (RP 243)

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- 15) Whether she signed a promissory note to GE or to Kawasaki; (RP 243)
- 16) Whether she was liable to Husqvarna for products; (RP 243)
- 17) What BRP stands for; (RP 244)
- 18) Whether she was ever liable to pay BRP or any other financier on BRP products purchased by Premier; (RP 244)
- 19) Whether she ever signed a Kawasaki dealer agreement; (RP 254)
- 20) Whether she ever signed a dealer agreement with BRP; (RP 254)
- 21) How much she paid her attorney of the \$17,500.00 she collected in spousal maintenance between June 2018 and the time of trial; (RP 378)
- 22) Whether she ever signed a promissory note or other document in the last five or six years to any flooring institution, financing institution, bank, manufacturer or lender; (RP 382)
- 23) What she did with \$170,000.00 when she didn't pay her attorney; (RP 397)
- 24) Whether she had \$50,000.00 on deposit that could have been used to buy Premier; (RP 398, 399)

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25) How far she drives to work; Whether it was less than five miles;

(RP 406)

Given the Petitioner's failure to provide reasonable answers to predictable questions at trial, it is not surprising that the trial court found her to be lacking in credibility. Against that backdrop, it was not an abuse of discretion to credit Respondent \$20,000.00 for the contribution of his separate property to buy the family home. In the absence of a documentary dispute, such as a check, money order, or closing statement to the contrary, such awards are routinely made and should be affirmed here.

#### **ATTORNEY FEES ON APPEAL**

Under RCW 26.09.140 this court has discretion to award attorney fees. The Respondent respectfully asks that attorney fees be awarded to him here for at least the following reasons:

- 1) No abuse of discretion has been shown or proven.
- 2) Each finding of the trial court was supported by substantial evidence.

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3) The Petitioner/Appellant brought this appeal after she had enjoyed or been awarded:

- a. She declared under penalty of perjury that her monthly expense to her attorney was \$1,000.00. The truth was and is that she paid only \$6,500.00 in over three (3) years. Of that sum, \$5,000.00 was paid as a retainer in August 2015. That means between September 2015 and the trial date in January 2019, she paid a total of \$1,500.00 in forty (40) months.
- b. After separation and before trial, she had at her disposal, not counting funds at her disposal to pay mortgage payments made until the mortgage balance was reduced to zero, over \$200,000.00.
- c. Since the FINAL DIVORCE ORDER was entered, over \$40,000.00 has been paid in compliance with that order. She paid zero.

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- d. At separation, she was left with zero consumer debt. She incurred about \$6,500.00 in consumer debt after separation.
- e. After the first mortgage on the family home was reduced to zero in 2018, she continued to collect \$2,500.00 per month in Spousal Maintenance.
- f. Her lifestyle was never affected. She lived in the family home with almost all the personal property.
- g. Her vehicle, a Honda Accord, was paid off before separation. She never had a car payment, and doesn't have one now. For a substantial period of time, she had a gas card paid and her cell phone bill paid.
- h. With no mortgage payment, no car payment, no consumer debt at separation, no gas bills for a long period of time, no cell phone bill for a long time, and over \$200,000.00 at her disposal, no disturbance of her lifestyle, no need to replace expensive items such as appliances, she brings this appeal from within a very small segment of the population of

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divorced persons, and without merit. It is respectfully submitted that she brings this appeal for personal reasons, or because she is angry.

- 4) For all these reasons, the Respondent should be awarded attorney fees on appeal.

### **ARGUMENT**

The Appellant cites Atkinson v. Atkinson, 38 Wash. 2<sup>nd</sup> 769, 773, 231 P. 2<sup>nd</sup>. 641 (1951) for the proposition that the trial court abuses its discretion when it assigns a value to a property that was not within the record. In Atkinson, the trial court set a value on both real and personal property at \$5,000.00. Ms. Atkinson and other witnesses opined that the value of both real and personal property was \$12,000.00, or \$11,705.00, or \$11,000.00. Mr. Atkinson valued the property at \$4,000.00, not including furniture. Exercising its discretion after hearing the testimony and considering the evidence admitted at trial, the trial court did not regard those valuations as realistic. Atkinson, supra at 772.

Following the Appellant's line of reasoning to its logical conclusion, no trial judge ever has discretion to value any asset at any

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value higher or lower than that testified to in court. An example follows. One item of community property is a new Cadillac with only ten (10) miles on the odometer. It was purchased by the parties a day before separation for \$50,000.00 cash. Neither party valued it at trial at more than \$5,000.00. No expert or appraiser testified as to its value. The highest value in the record is \$5,000.00 and the trial court abuses its discretion in setting the value higher than that found in the record.

69 years ago, the appellate court in Atkinson may have been influenced by the trial court's finding that Ms. Atkinson was a fit and proper person to be awarded the care, custody and control of the minor children, despite having found that she has an ungovernable temper, is unreasonably jealous, has not properly cared for the home of the parties or the minor children, all of which were without just cause or provocation. Atkinson, supra, at 770. Concerned that Ms. Atkinson, with her fixations and obsessions, would destroy the child's affection and regard for his own mother, as she had done with her three older children, or that he would become warped into the pattern of her hates, jealousies and suspicions, the court awarded the care, custody and control of both minor children to the

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father. The Respondent respectfully suggests that it is impossible to know the extent to which the trial judge was influenced by the custody issue as he exercised discretion in setting property values.

Against that backdrop, the trial court here valued the business at \$500,000.00. That was within the evidence. The expert witness called by the Petitioner/Appellant, using a “market value” approach and employing EBITDA, arrived at a value of \$537,000.00. Subtracting \$37,000.00 for revenue generated by a new dealership—Husqvarna—acquired after separation netted his opinion at \$500,000.00. Using an asset approach, his value was \$372,000.00, only \$37,000.00 more than that opined by Ms. Price-Scott, whose opinion as to value was \$335,000.00 after accounting for and treating the debt to Respondent’s mother, as found by the trial court.

An appellant must demonstrate why specific findings of the trial court are not supported by the evidence and cite to the record in support of that requirement. In re Estate of Lint, 135 Wn. 2<sup>nd</sup>. 518, 532, 957 P. 2<sup>nd</sup> 755 (1988).

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An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Katare, 175 Wash. 2d at 35. When supported by substantial evidence, we accept the trial court's findings of fact as verities on appeal. Katare, 175 Wn.2d at 35. Substantial evidence is that which is sufficient to persuade a fair-minded individual of the truth of the matter asserted. Katare, 175 Wn.2d at 35.

The trial court has discretion when awarding spousal maintenance and the party challenging a spousal maintenance award must demonstrate that the trial court manifestly abused its discretion. In re Marriage of Maretta, 129 Wash.App. 607, 624, 120 P. 3d 75 (2005), abrogated on other grounds by In re Marriage of McCausland, 159 Wn.2d 607, 152 P.3d 1013 (2007). While it does have broad discretion, the trial court's award must be just in light of the statutory factors under RCW 26.09.090. In re Marriage of Luckey, 73 Wash.App. 201, 209, 868 P.2d 189 (1994).

When determining maintenance, some of the non-exclusive factors the trial court must consider are (1) the financial resources of the party seeking maintenance, (2) the party's ability to independently meet his or

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her needs, (3) the time necessary for the party seeking maintenance to find employment, (4) the duration of the marriage, (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance, and (6) the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations. RCW 26.09.090; Marzetta, 129 Wash. App. At 624. Consideration of the first factor, the party's financial resources, includes apportioned community property. See RCW 26.09.090(1)(a). The trial court is governed strongly by the need of one spouse and the ability of the other spouse to pay. In re Marriage of Foley, 84 Wash. App. 839, 845-46, 930 P.2d 929 (1997).

In determining whether substantial evidence exist to support a finding of fact, the record is reviewed in the light most favorable to the party in whose favor the finding more entered. Marriage of Gillespie, 89 Wash. App 390, 404 948 P\* 1338 (1997)

Trial court may properly consider the property division when determining maintenance and may consider maintenance in which an equitable division of the property. See Marriage of Este 84 Wash. App 586, 593 929 (1997)

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234¶20 We review a trial court's award of maintenance for abuse of discretion. In re Marriage of Valente, 179 Wash. App. 817, 822, 320 P.3d 115 (2014). The court has broad \*\*641 discretion to award maintenance. In re Marriage of Bulicek, 59 Wash. App. 630, 633, 800 P.2d 394 (1990). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Anthony, 9 Wash. App. 555, filed 07-01-2019 is instructive on Spousal Maintenance, citing In re Marriage of Larson, 178 Wash. App. 133, 138, 313 P.3d 1228 (2013).

\*564 56789¶21 Absent a showing of manifest abuse of discretion, we will not disturb the award of maintenance. In re Marriage of Washburn, 101 Wash.2d 168, 179, 677 P.2d 152 (1984). "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." Bulicek, 59 Wash. App. at 633, 800 P.2d 394; In re Marriage of Wright, 179 Wash. App. 257, 269, 319 P.3d 45 (2013); Washburn, 101 Wash.2d at 182, 677 P.2d 152. While the trial court must consider the factors listed in RCW 26.09.090(1), it is not required to make specific

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factual findings on all of the factors. In re Marriage of Mansour, 126 Wash. App. 1, 16, 106 P.3d 768 (2004). An award of maintenance is “a flexible tool by which the parties’ standard of living may be equalized for an appropriate period of time.” Washburn, 101 Wash.2d at 179, 677 P.2d 152. Ultimately, the court’s main concern must be the parties’ economic situations post-dissolution. Washburn, 101 Wash.2d at 181, 677 P.2d 152.

1011¶22 Maintenance not based on a fair consideration of the statutory factors constitutes an abuse of discretion. In re Marriage of Crosetto, 82 Wash. App. 545, 558, 918 P.2d 954 (1996). We treat the trial court’s findings of fact as verities on appeal, so long as they are supported by substantial evidence. In re Marriage of Chandola, 180 Wash.2d 632, 642, 327 P.3d 644 (2014). “Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted.”Chandola, 180 Wash.2d at 642, 327 P.3d 644.

In re Marriage of Anthony, 9 Wash. App. 2<sup>nd</sup> 555, filed 07-01-2019, is often cited for the proposition that the court is not required to follow a mandate to somehow equalize the economic positions of the parties in a long-term marriage.

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## CONCLUSION

The Appellant has not met her burden. The trial court did not abuse its discretion, and none has been shown or proven. The findings of the trial court were and are supported by substantial evidence. The ruling of the trial court should be affirmed.

Given the undisputed fact that during all time periods pertinent here, prior to separation the parties income was almost equal. The trial court did not abuse its discretion in finding that Respondent's income was approximately \$40,000.00 per year.

Given the undisputed fact that the lifestyle of Petitioner/Appellant was never disturbed, and the fact that she occupied the family home exclusively at all times following separation, and given the undisputed fact that she received Spousal Maintenance in the sum of \$2,500.00 per month for approximately eight (8) months after the first mortgage balance was reduced to zero, plus Spousal Maintenance in varying amounts for approximately three (3) years before the last mortgage payment was made, plus the use of a gas card and payment of her cell phone bills for approximately three (3) years before trial, plus

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approximately \$35,000.00 in cash she withdrew without notice to the Respondent, it was not an abuse of discretion to award a credit for rental value of the family home to Respondent. To do otherwise would have been unjust enrichment to the Petitioner/Appellant. The same applies to offsetting fair rental value against attorney fees awarded to the Petitioner.

Given the undisputed fact that the entire down payment for the family home in the sum of \$20,000.00 came from Respondent's separate property, owned before marriage in Duvall, Washington, it was not an abuse of discretion to credit Respondent in that sum for contribution of his separate funds to purchase the family home.

For reasons set forth herein, it was not an abuse of discretion to distribute property and allocate debt as ruled upon by the trial court. It was not an abuse of discretion to award over \$280,000.00 in total Spousal Maintenance to Petitioner, especially given the undisputed fact that she spent over \$200,000.00 in cash from various sources before trial with only a mattress, a mixer and some makeup wipes to show for it.

Given the undisputed fact that the exhibits showed only approximately \$4,000.00 spent on personal expenses, and the fact that

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both parties benefited from those expenditures, it was not an abuse of discretion for the trial court to rule that such expenditures were minimal, especially since Petitioner produced no evidence to the contrary.

Given the fact that the trial court found the Petitioner's testimony not to be credible, and the fact that she produced no evidence showing any attempt to seek further education, and/or to market her bilingual skills, and the fact that the undisputed evidence showed that she was unemployed for periods of time while this matter was pending, and that her unemployment did not cause her financial problems because she didn't need to work to pay her bills, and the fact that her lifestyle was undisturbed at all times while this matter was pending, it was not an abuse of discretion for the trial court to rule that she should be in a position to maintain or exceed her standard of living for a reasonable period of time and become self-supporting.

Given the fact that the family home was a community asset, and the mortgage was a community debt, and that therefore any funds in the reserve account were community property, it was not an abuse of discretion to divide the refund check in half.

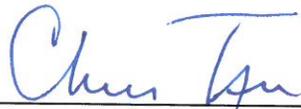
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Given the fact that the Petitioner was not honest with the court about payment of her attorney fees, and the fact that she was found to be not credible, it was not an abuse of discretion to offset \$49,343.00 against the Petitioner's attorney fees.

The ruling of the trial court should be affirmed, or in the alternative this court should give some consideration of awarding the retirement fund in the sum of \$114,307.00 to Respondent, and/or terminating Spousal Maintenance before Respondent's death.

Respectfully submitted this 28<sup>th</sup> day of February, 2020.



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**Chris Tait**

**WSBA 6104**

**Attorney for Respondent Matthew E. Wilcox**

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**Appellate Court Case Title:** In re Marriage of: Marina Palomarez (fka Wilcox) and Matthew E. Wilcox  
**Superior Court Case Number:** 15-3-00807-5

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