

No. 63066-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of

REBECCA STEWART

Appellant

and

JERRY STEWART

Respondent

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ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

RESPONDENT'S BRIEF

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I. INTRODUCTION

When this 40-year marriage ended, the court had to distribute a modest estate between a husband who is terminally ill and a wife who has not worked out of the home for forty years. In light of these circumstances and the considerations mandated by Washington law, the court accomplished a fair and equitable distribution, which awarded to the wife and to the husband, respectively, 56% and 44% of the estate, and awarded to the wife maintenance of \$1,800 monthly. The wife's challenge to the validity of the decree is frivolous and her challenge to the court's distribution fails to demonstrate any abuse of discretion.

II. ISSUES IN RESPONSE

1. Where a spouse commences a proceeding for legal separation and the other spouse counterclaims for dissolution, must the answering spouse also file and serve by process a summons and petition for dissolution?

2. Where a petition for legal separation is answered with an allegation the marriage is irretrievably broken and with a request for dissolution, where there is no objection to lack of jurisdiction, where the matter proceeds to trial and the court enters a decree

dissolving the marriage on evidence the marriage is irretrievably broken, is the dissolution decree void?

3. Where a spouse alleges and testifies that the marriage is irretrievably broken, does Washington law require the court to grant a decree dissolving the marriage, even if the other spouse wants only a legal separation?

4. Where evidence supports that insurance proceeds existed at the time of separation, but that one spouse spent those proceeds before trial, may the court choose to value those proceeds as of separation and equalize their distribution?

5. Where a family business encompasses, as its major part, an accounting practice, but also includes a small radio production business, and where the business in its entirety is properly valued and distributed by the court, and where the wife offered no proof and made no argument that the radio business had any separate value, can she claim for the first time on appeal that the trial court erred when it awarded the "radio business" to the husband?

6. Where substantial evidence supported that the parties' spent as much as the business made during the year of separation, and the wife was unable to point to any shortfall or

discrepancy, was the court free to find the expenses were as the husband proved them to be?

7. Where the wife's claimed monthly expenses were inflated, and the court discounted them accordingly, and where the husband, because of his terminal cancer, had a limited ability to pay maintenance, did the court act well within its discretion to order to the wife permanent maintenance in an amount somewhat smaller than her monthly expenses, but as much as the husband could pay, especially where the wife received a disproportionate award of the marital estate and could make up the shortfall with income from her assts?

8. Did the wife properly assign error to the court's finding that the parties could pay their own attorney fees and, if not, is that finding a verity on appeal?

9. Where the wife received 56% of the marital estate and \$1800 in monthly maintenance, did the court act within its discretion when it found she could afford her own fees?

10. Where the wife's conduct of pretrial and trial, including baseless accusations of missing or misappropriated assets, increased the cost of litigation, was the court right to deny her attorney fees?

11. Where this same intransigent conduct is apparent on appeal, and where the husband has the need and the wife the ability to pay, should the husband receive his fees on appeal?

III. RESTATEMENT OF THE CASE

At the time of trial, Jerry was 60 years old and living on borrowed time. CP 443-451. His medical expert testified that only three out of 600 other patients have lived with carcinoid cancer as long as Jerry. Id. He estimates Jerry likely has only three to four years to live, with some of those years marked by morbidity. Id., at 29, RP (Trial) 77-83. Based on this evidence, the court found Jerry's life expectancy to be approximately three and one-half years. See CP 92. Again, based on medical evidence, the court found it "advisable for the husband to substantially reduce his work schedule as the stress of work adversely affects the husband's health." Id.; CP 443-451; RP (Trial) 108.

Jerry has worked since he was 14. RP (Trial) 76. For years, he has run the family accounting business, Stewart Tax & Accounting, with Rebecca contributing some work early on. RP (Trial) 25, 195. Jerry intended to continue working, but after hearing his doctor's frank testimony in deposition, he realized more

fully the seriousness of his condition. RP (Trial) 77-82, 203-209. In the aftermath, he found himself unsure what he should or could do with the time remaining to him. The doctor had told him these were his “golden years,” since his treatment has worked longer than expected. At some point, the treatment’s efficacy will cease and Jerry will have to try other treatment modalities, none of which will alter the fact that he faces a lengthy dying process. RP 77-82 (Trial). This information has shaped Jerry’s views on what to do after the dissolution of his marriage. RP (Trial) 207-208 (Jerry hearing doctor’s deposition testimony on 10/28/08 was “the first time I really understood how sick I am”)

Given the anticipated need for a caregiver at the end of his life, Jerry wants to sell the accounting business and move to Texas, where his brother lives. RP (Trial) 82-83, 107, 232. After he completes the transition of the business to the new owner, Jerry does not know how much he can or will want to work, since he is running low on both time and money. RP (Trial) 200-203.

Jerry’s wife, Rebecca, stopped working outside the home early in the marriage, when their second child was born. RP (Trial) 23-24. The parties agreed she should stay home. Later, as the children aged, Jerry encouraged her to get out and work, but

Rebecca never took another job. RP (Trial) 126. The parties lived comfortably, enjoying the services of a housekeeper and eating out a lot. RP (Trial) 107-108, 127.

At the time of separation, Jerry was working long days during tax season. RP (Trial) 207. Arriving home one night, the parties had an argument. Rebecca called the police and accused Jerry of domestic violence. RP (Trial) 283-284. He was taken from the home and never returned. RP (Trial) 224. The dissolution trial judge found no reason to enter a continuing restraining order. RP (01/20/09) 3 (Court: "First thing I want to say is that the restraining order needs to be set aside. We don't need a restraining order ..."); CP 90, 93.¹

Rebecca filed for legal separation later on the same day she had Jerry arrested. CP 261-268. Jerry responded with a counterclaim for dissolution, alleging the marriage to be irretrievably broken. CP 154. After mediation failed, the matter proceeded to trial before the Hon. Stephen Mura.

¹ Rebecca mentions her allegations twice in her brief. Br. Appellant, at 1, 10. Even if true, the alleged conduct is irrelevant, which is why Jerry does not spend time here refuting the allegations. RCW 26.09.080 (providing for disposition of property and liabilities at dissolution "without regard to marital misconduct").

At trial, Rebecca spent considerable time insinuating that Jerry had hidden assets or failed to disclose financial information, only to concede at the end of trial that Jerry had been forthright. See, e.g., RP (Trial) 54-55, 157-194, 235-238, RP (Trial) 274. She also had to concede that most of the financial records were left in her possession at the family residence, which Jerry was restrained from entering. RP (Trial) 52-54. She also had access to all their accounts at the bank, since she was a signatory and also because Jerry signed a release giving her access. RP (Trial) 116, 231, 242. Finally, she was unable to produce any evidence supporting her accusations. RP (Trial) 72. Moreover, Jerry demonstrated he had fully performed all discovery obligations and fully accounted for all the family's assets. See, e.g., Exhibit 21; RP (Trial) 115-125, 221-224, 224-233. Based on all the evidence, the trial court found that Jerry "has not transferred, secreted or acted in any untoward manner toward the wife in the management of the community assets." CP 92.

At the conclusion of the trial, the court found the marriage to be irretrievably broken, to which Jerry had testified. CP 88; RP (Trial) 76, 282. The court then made a fair and equitable distribution of the property and liabilities, awarding 56% to Rebecca

and 44% to Jerry and awarding Rebecca \$1800 monthly maintenance, terminating upon either parties' death. RP (01/20/09) 12; CP 89-90, 92-93. Additional facts are addressed in the argument section below.

IV. ARGUMENT IN RESPONSE

A. THE TRIAL COURT PROPERLY ENTERED A DECREE OF DISSOLUTION AND THE DECREE IS VALID.

Rebecca's argument on jurisdiction is a little hard to follow. She claims the decree is void because Jerry did not prepare and serve, with separate summons, a petition for dissolution, after she had served him with a petition for legal separation. Br. Appellant, at 11-12. Thus, even though she commenced this legal proceeding, she claims the court lacked jurisdiction over her. Br. Appellant, at 13. This novel argument finds no support in the civil rules, the statutes, or case law.

First, it should be noted that Rebecca made no objection below to entry of a dissolution decree. Because she proceeded to trial and asked for affirmative relief (in the form of property distribution and maintenance), she waived any claim that the court lacked personal jurisdiction. *See, Marriage of Steele*, 90 Wn. App. 992, 997-998, 957 P.2d 247 (1998) (party waives any claim of lack

of personal jurisdiction “if, before the court rules, he or she asks the court to grant affirmative relief, or otherwise consents, expressly or impliedly, to the court's exercising jurisdiction.”). Indeed, it has long been the law in Washington that “[i]f a party wishes to claim lack of personal jurisdiction, he or she must do so (a) as soon as reasonably practicable and (b) consistently.” *Steele*, 90 Wn. App. at 997. This sensible principle precludes Rebecca from sitting on her hands through pretrial proceedings and trial, then asking the appellate court to send the matter back for a complete “do over.” This marriage is over and Rebecca’s untimely complaint about personal jurisdiction cannot resurrect it.

Rebecca’s argument also fails to make sense otherwise. After all, she submitted to the court’s jurisdiction by petitioning for legal separation, by which this legal proceeding was commenced. CR 4.1. Her summons was the mechanism by which the court obtained jurisdiction over Jerry. CR 4.1. Rebecca provides no authority for the proposition that a court somehow lacks jurisdiction over the party who commences a proceeding.

Rebecca’s summons commanded Jerry to respond by serving a copy of his answer on Rebecca’s counsel. CP 261; see CR 4.1(b); see, *also*, CR 5 (service requirements for “every

pleading subsequent to original complaint”). Jerry’s answer included a counterclaim for dissolution, permitted under CR 13(c) (permitting a counterclaim for relief exceeding or different in kind from that sought in the petition). Rebecca tacitly concedes she received Jerry’s answer. Br. Appellant, at 11-12. Moreover, she offers no authority for her apparent claim that Jerry was required to commence, by summons and petition, a separate proceeding for dissolution. And the statute she cites will not carry that freight. Br. Appellant, at 11-12. RCW 26.09.030 provides that, where requested, a court will grant a decree of legal separation “unless the other party objects and *petitions* for a decree of dissolution ...” RCW 26.09.030(d) (emphasis added). Use of the word “petition” in the statute does not mandate use of process, if that is what Rebecca is arguing. Indeed, petitions take many forms in the law, including, for example, a “petition for review” to Washington’s Supreme Court and a “personal restraint petition,” neither of which needs to be served with a summons. See RAP 13.4; RAP Title 16. A “petition” is simply “a formal request presented to a court or other official body.” *Black’s Law Dictionary* (8th Edition, 2005).

The cases Rebecca cites do not help her, since neither involves a counterclaim for dissolution in answer to a petition for

legal separation. For example, this case bears no resemblance to one involving a default judgment in which a petitioner receives more relief than requested in the originally served petition, as was the case in *Marriage of Markowski*, 50 Wn. App. 633, 749 P.2d 754 (1988). There, the wife served a petition for legal separation. Before entry of a decree of legal separation, she petitioned again, this time for dissolution. Because she, the petitioner, sought an additional kind of relief, the civil rules required her to serve her husband by process. CR 5(a). The wife could not rely on the governing statute, which allows conversion by motion of a decree of legal separation into a decree of dissolution, because no decree of legal separation was obtained. See RCW 26.09.150. In short, *Markowski* bears no resemblance to the Stewart case.

The other case Rebecca cites is even less helpful. In *Chai v. Kong*, 122 Wn. App. 247, 93 P.3d 936 (2004), this court rejected the argument that a motion to convert a decree of legal separation into a decree of dissolution must be served by process. Not only does the statute expressly authorize service by motion, the constitution takes no offense at this procedure because “[p]arties to a separation proceeding have constructive notice” that the decree

of legal separation may, by motion, be converted to a decree of dissolution.” *Id.*, at 255.

Again, it is not clear how *Chai v. Kong* applies to this case. The court did not enter a decree of legal separation, then convert it to a decree of dissolution. Rather, here, Rebecca commenced the proceeding as one for legal separation. She had notice of Jerry’s counterclaim for dissolution. She failed to complain that the court lacked jurisdiction over her for purposes of dissolving the marriage, but sat silently (on this point) throughout an entire trial. Her argument that the decree is void simply makes no sense.

B. THE COURT WAS REQUIRED TO ENTER A DECREE OF DISSOLUTION BECAUSE THE MARRIAGE WAS IRRETRIEVABLY BROKEN.

Rebecca seems to argue that because her religious beliefs prohibit marital dissolution, the court could not dissolve the marriage. Br. Appellant, at 11. In fact, the only thing the court could do after this trial was to enter a decree of dissolution. The trial court found the Stewart marriage to be irretrievably broken. CP 88. Jerry alleged that it was in his response to Rebecca’s petition for legal separation and he testified that it was. CP 88; RP (Trial) 76. Rebecca disagreed, because she does not believe in divorce. RP (Trial) 27. However, “[a]bsent fraud, or coercion, the allegation

that the marriage is irretrievably broken is all that is required to support a decree of dissolution, and the judge has no function in evaluating the evidence with respect to its grounds.” *Little v. Little*, 96 Wn.2d 183, 192, 634 P.2d 498 (1981). Accordingly, the trial court had to enter a decree of dissolution. CP 62-86.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING A JUST AND EQUITABLE DISTRIBUTION OF PROPERTY AND LIABILITIES.

1) Standard of review.

In the distribution of property and liabilities at dissolution, what controls is the statutory mandate to be just and equitable. RCW 26.09.080. In respect of that goal, the court’s paramount concern when distributing property is the economic condition in which the decree leaves the parties. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). *See, also*, RCW 29.09.080(4) (court must consider economic circumstances of the parties).

Importantly, “[t]he key to equitable distribution of property is not mathematical preciseness, but fairness.” *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989) (quoting *In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975)). And, of course, what is fair is generally for the trial court to decide,

a decision that will not be disturbed on appeal absent a manifest abuse of discretion. *In re Marriage of Konzen*, 103 Wn.2d 470, 477-478, 693 P.2d 97 (1985); accord *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). Thus, in her appeal, Rebecca bears a “heavy burden.” *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Simply, she must show that “no reasonable judge would have reached the same conclusion” as did the judge here. *Id.*, at 809-810.

Moreover, she must carry this burden without retrial of the factual issues, since the trial court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). After all, it is the trial court's role to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). For these reasons, decisions in dissolution proceedings will seldom be changed on appeal. *Marriage of Landry*, 103 Wn.2d at 809. All of these principles apply here to require the trial court be affirmed.

- 2) Any value attached to the radio business was included in valuation of the accounting business, since they were not separate entities, and, in any case, Rebecca waived any objection to the contrary by failing to raise this issue at any time in the trial court.

Rebecca argues the trial court erred by not valuing a radio business it awarded to Jerry. Br. Appellant, at 14; see CP 69 (awarding “Husband’s Radio Business”). A reader of the record might fairly be heard to ask, “what radio business?” In the trial, two inquiries are made concerning radios. The first had to do with Jerry’s hobby of purchasing and refurbishing antique radios. RP (Trial) 40-41, 133-134. Before the end of trial, the parties agreed as to the distribution of personal property. CP 68.

The second mention of radios occurs when Rebecca’s counsel asks Jerry if he intends to continue working in his “radio business.” RP (Trial) 203. He responded that he would like to. Id. No one offered any evidence regarding the nature of this business or what separate value, if any, it might have.

In her brief, Rebecca cites to references to the radio business in pretrial pleadings, none of which appeared to be before the trial court. For example, nearly a year before trial, Rebecca filed a declaration in which she discussed Jerry’s work schedule, noting he had hired an employee “so he could work more on his

radio programs” and that he would stay longer at the office to “do his radio work.” CP 192. The only follow-up to this inquiry was in the question to Jerry whether he intended to continue to work in the radio business, to which he replied that he wanted to do so, a reply that must be read in light of the other evidence concerning Jerry’s health and the impact on his ability to work.

Five months before trial, in a declaration, Rebecca asks to be able to “video record” the interior of the accounting office “as well as the radio room.” CP 123. She expresses concern that items may be missing and observes that the “radio room has very expensive equipment” in it. *Id.* Nothing is heard about this issue again.

In his deposition, Jerry explained that he self-produces his own radio programs as part of Stewart Tax & Accounting. CP 352 (Deposition of Jerry Stewart). All expenses and income are included in the accounting business. *Id.* Rebecca agreed the business was “the only source of income” for the parties. CP 555 (Declaration of Lynette Korb, at 2). The parties stipulated to the business value. RP (Trial) 287.

Now, for the first time, Rebecca argues the radio business had a separate existence and separate value and faults the court

for not valuing it. Br. Appellant, at 14, *citing Wold v. Wold*, 7 Wn. App. 872, 878, 503 P.2d 128 (1972). Because this argument is raised for the first time on appeal, it should not be considered. RAP 2.5(a). Throughout pretrial and trial proceedings, Rebecca never once raised this issue. Obviously, she knew about the “radio business” and could have, at any time, developed facts, if any existed, to support an argument that the radio business had some value apart from the accounting business. Her failure to do so precludes her from raising the issue now.

In any case, because the radio business was part of the accounting business and the accounting business was valued (CP 94), Rebecca is wrong as a matter of fact. For the same reason, *Wold v. Wold*, 7 Wn. App. 872, 503 P.2d 118 (1972), does not apply, since the problem in that case was that the trial court did not make findings as to disputed property values. *See, also, Greene v. Greene*, 97 Wn. App. 708, 712, 986 P.2d 144 (1999) (reversible error if court does not resolve dispute as to property value). Here, there is no dispute. There is no separate valuation of the radio business because there is no evidence to support any separate value. Certainly, there was no dispute at trial on this issue, so nothing the trial court could – or was asked to – resolve.

3) When the trial court accounted for predistributions to the party, it did not distribute nonexistent assets.

Rebecca challenges the court order requiring her to pay Jerry \$1,027 for half of insurance claim proceeds because she claims the proceeds no longer exist. Br. Appellant, at 15-16. Rebecca testified that the parties received the proceeds, but said the money was gone by the time of trial. RP (Trial) 49. Jerry testified that it was in the safe when he was removed from the family residence and that he had not spent it. RP (Trial) 114. The court chose to believe Jerry. CP 67 (“The insurance proceeds of \$2,054 were in the wife’s possession at time of separation.”); see, also RP (O1/20/09) 6, 9. This was the trial court’s call to make. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999) (credibility determinations are solely the province of the trial court).

Rebecca argues the court cannot credit Jerry half this money because she spent it. Br. Appellant, at 16. It is true that a court cannot distribute an asset that no longer exists. *Marriage of Kaseburg*, 126 Wn. App. 546, 561, 103 P.3d 1278 (2005); see, also, *Marriage of White*, 105 Wn. App. 545, 551, 20 P.3d 481 (2001). However, it is also true that a court can value an asset as of the date of separation, which is what the trial court actually did here. See *Marriage of Griswold*, 112 Wn. App. 333, 351, 48 P.3d

1018 (2002) (affirming trial court's decision to value the family home at the time of separation). Rebecca was restrained post-separation from disposing of the parties' property except as agreed in writing by the parties. CP 259. The court was well within its discretion to equalize the distribution of assets to account for her having spent the insurance proceeds. Indeed, a contrary principle would encourage spouses, post-separation, to dispose of assets as hastily and completely as possible.

Moreover, both *Kaseburg* and *White* are distinguishable. In *White*, the trial court had awarded to the wife money she used to pay off the mortgage on the family residence four years *before* separation. By contrast, the money at issue here existed on the date of separation. Likewise, in *Kaseburg*, the trial court essentially distributed at dissolution a former interest in community property, i.e., property that had been foreclosed. Again, the facts there bear no resemblance to the facts here. Rebecca either has or spent the insurance proceeds. Properly, Jerry's half of those proceeds will be deducted from Rebecca's share of the accounting business sale proceeds. CP 67.

4) There was substantial evidence that the business income was spent on the parties' increased expenses.

The trial court rejected Rebecca's allegations of mismanagement and nondisclosure. CP 92.

The wife has alleged that the husband has secreted community assets. The court finds that the husband has not transferred, secreted or acted in any untoward manner toward the wife in the management of the community assets.

CP 92. The court arrived at this finding because Rebecca was unable to identify any discrepancy in Jerry's accounting. RP (Trial) 54-58. Rather, her suspicions seemed based more on the fact that she did not conduct discovery adequately (or efficiently), for which she blamed Jerry. Considerable time at trial was spent rehashing the pretrial discovery process, to the point the court admonished Rebecca for wasting trial time. RP (Trial) 72, 190-191, 244-245. Indeed, as Rebecca conceded, she had the records by time of trial. RP (Trial) 245, 247. Rather, her point, she claimed, was that Jerry had not been cooperative. *Id.*² Properly, the court was more interested in whether Rebecca could point to any evidence of financial wrongdoing. RP (Trial) 72. She was unable to do so.

²In fact, Jerry did everything he could to provide requested information. RP (Trial) 242; Exhibit 21. However, his cooperation was hindered by the fact that nearly all the financial records were in Rebecca's possession and she did not easily understand them, despite how carefully Jerry maintained them. See, e.g., RP (Trial) 53-58, 71, 125, 224-231, 245.

Nevertheless, on appeal, Rebecca claims that the accounting was inadequate and that a new trial is needed to accomplish what she could not accomplish in the first place. Br. Appellant, at 17-18. Again, her accusations are vague and unsubstantiated. She suggests there is a problem because, in 2008, the year of separation, the parties ran through a lot of money. See, e.g., RP (Trial) 209. This fact is hardly surprising, since, beginning in March, they had to support two households and a couple of attorneys. Despite this dramatic change in their personal economy, they continued, post-separation, to maintain a recreational property, in part at least, due to Rebecca's own wishes. RP (Trial) 59-60. Jerry bought a condo. RP (Trial) 209. There were considerable expenses related to a property purchased for a daughter with Jerry's inheritance. RP (Trial) 209-210. And, of course, Jerry paid Rebecca maintenance of nearly \$5,000 a month. RP (Trial) 66. Indeed, Rebecca's own expenses were considerable, and she ran through about \$80,000 in ten months. RP (Trial) 64.

In any case, Jerry painstakingly described the monthly expenses, to the court's complete satisfaction. RP (Trial) 115-125, 157-196, 221-231; RP (01/20/09) 4 (court finding Jerry has not squandered or hidden or disposed of assets). Rebecca conceded

she had all the records by the time of trial, but could point to no discrepancy in them. Indeed, at one point, during questioning from Rebecca's counsel, Jerry totaled one month's expenditures on the stand to the dollar. RP (Trial) 184-186. Again, on appeal, Rebecca simply fails to show that anything was amiss. Before distributing the property and liabilities, the judge was fully advised in the actual facts.

5) The trial court's maintenance award was based on careful consideration of the wife's need and the husband's ability to pay.

Maintenance is not a matter of right. *Marriage of Mueller*, 140 Wn. App. 498, 510, 167 P.3d 568 (2007). Rather, the court's decision to award maintenance, after consideration of the statutory factors, is within its sound discretion. Rebecca demonstrates no abuse of discretion here. Br. Appellant, at 18-20.

In awarding maintenance, the court had to consider not only Rebecca's needs, but also Jerry's ability to pay maintenance, an ability profoundly compromised by his medical condition. See RCW 26.09.090(f) (court must consider "[t]he ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the

spouse or domestic partner seeking maintenance.”).³ See CP 89 (FOF 2.12: “health of the parties”); RP (01/30/09) 10. Explicitly, the court found “that the Husband does not have the ability to pay \$2600/month in light of his living and medical needs with terminal cancer.” CP 89; RP (1/20/09) 7. Substantial evidence supported this finding, including substantial medical evidence. RP (Trial) 77-83; CP 422-458 (Deposition Dr. Pommier). Jerry’s doctor advised

³ RCW 26.09.090. Maintenance orders for either spouse or either domestic partner—Factors

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

advised him to work less, since the stress of his employment took a toll on his health, and because this period of time, while his treatment was still working, was likely to be short and to be the last of Jerry's "golden years." RP (Trial) 77-82. Moreover, once his treatment stopped working, Jerry could anticipate increasing debilitation and increasing medical and care expenses. *Id.* In short, Jerry demonstrated a need to work less and a need to spend more, as his disease progressed.

As Jerry faces these harsh realities, Rebecca wants to maintain the lifestyle she enjoyed while married and during Jerry's good earning years. However, as the trial court observed, "everybody comes into these cases wanting to be in the same position that they were in before the divorce and it just doesn't happen." RP (01/30/09) 3. An unfortunate reality facing divorcing couples is that their money does not go as far as it did when they had one household, not two. Certainly, Rebecca's request for \$4500 to \$6000 in monthly maintenance suggests precisely that kind of unrealistic thinking. See RP (Trial) 66, 277.

The court, after careful analysis of Rebecca's actual financial needs, and with an understanding that her post-dissolution economy was necessarily more frugal, found that Rebecca needed

\$2600 monthly to meet her expenses. CP 889; RP (01/30/09) 10.⁴

For example, the court suggested Rebecca could economize on her telephone service and pay \$24 monthly instead of \$115, and could live without a cell phone. RP (01/30/09) 10-11. Similarly, the judge discredited Rebecca's claim that she needed \$300 monthly to pay for the insurance and license on her, fully paid for, 2001 Chevy Suburban. Id.

The court arrived at its conclusion as to Rebecca's needs based on review of her financial affidavit and on the testimony given at trial. RP (01/30/09) 9-10; RP (Trial) 59-67; Exhibit 1. Rebecca testified she was spending every month \$850 on food, \$250 on lawn maintenance, \$500 on clothing, \$840 on utilities. See, also, RP (Trial) 107-108. The court was well within its discretion to find these expenses inflated and, further, to anticipate a reduction in expenses because of how the real property was dealt with at trial (e.g., eliminating the need for payment on recreational property, RP (Trial) 30-36. Finally, the court observed that Rebecca could make up the difference between her actual expenses (\$2600) and maintenance awarded (\$1800) with income

⁴ Rebecca does not take issue on appeal with this finding.

from the disproportionate award of assets she received. RP (01/20/09) 10-12.

In sum, the court carefully analyzed the financial needs and abilities of the parties, pursuant to the statutory mandate, and awarded maintenance accordingly. In doing so, the court acted fully within its discretion.

Likewise, the court was well within its discretion to apportion the life insurance policies as it did. Br. Appellant, at 20-21. If anything, Jerry could justifiably claim he received the short end of this stick. Anticipating his special need, Jerry purchased a special rider for the whole life policy, which allowed him to received up to half of its \$400,000 value at the point when his death is imminent. RP (Trial) 231-233. His purpose was to provide for his care in his final days. Id. The court awarded only \$100,000 of that policy to Jerry, with Rebecca receiving the other \$300,000. Rebecca's complaint that she will not be the beneficiary of more of the policy ignores this important feature of it.

Rebecca also ignores or misrepresents other important facts. The parties' circumstances were considerably changed from what they were at the time Jerry purchased the policy and from when he assessed their financial status in March 2008. Br.

Appellant, at 20-21. Rebecca is not going to be caring for him when the need arises. Both of them have needs greater than when they could enjoy the economies of marriage, and, in Jerry's case, needs specific to the anticipated decline in his health. And their assets have suffered devaluation, along with the rest of the economy. RP (Trial) 209-210.

The court distributed the policies as it saw fit, given the difficult circumstances facing both parties. Rebecca may be disappointed in her changed life style, but Jerry faces his own battle. Rebecca's suggestion that he live off speculative disability and Medicaid payments is simply mean. See RP (Trial) 207 (Jerry does not know if he will claim disability or what it would pay), 233 (does not know if Medicaid will pay anything).

Rebecca received the lion's share of the estate, which included Jerry's separate property (inheritance). She fails to show the court abused its discretion in any respect, including in how it apportioned the insurance.

**D. THERE WAS NO ERROR IN MAKING THE PARTIES
LIABLE FOR THEIR OWN ATTORNEY FEES AT TRIAL,
BUT REBECCA SHOULD PAY JERRY'S FEES ON
APPEAL BECAUSE SHE RECEIVED MORE OF THE
PROPERTY AND BECAUSE SHE HAS BEEN
INTRANSIGENT.**

In her Assignments of Error, Rebecca states that “[b]ased on the overall circumstances of the parties, each party should pay their own costs and attorney fees.” Br. Appellant, at 4. Accordingly, she does not assign error to the trial court’s findings that a “[e]ach party is capable of paying their own attorney fees and costs and no award should be made.” CP 90 (¶ 2.14). However, later in her brief, Rebecca argues she should have received “additional” fees at trial and should receive her fees on appeal. Br. Appellant, at 21-23. Rebecca waived these arguments. RAP 10.3(a)(4) and 10.3(g); *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995) (findings are verities on appeal if party fails to assign error to them). Moreover, these arguments are baseless. If anything, Rebecca should pay Jerry’s fees, as she received a disproportionate award of the estate.

She was awarded 56% of the estate, including cash assets. RP (Trial) 12; CP 68-70. Not only is she healthier than Jerry, she

has more money. RCW 26.09.140.⁵ She failed to demonstrate at trial, and fails to demonstrate here, that she has a need for attorney fees or that Jerry has an ability to pay them. Indeed, Rebecca's conduct at trial, as well as this appeal, suggests that she has unnecessarily driven up the costs of litigation. She complained a great deal during pretrial and at trial about missing assets and missing documentation, but could not support her insinuations with even a shred of evidence, as she concedes by the end of trial. RP (Trial) 274 (not accusing Jerry of lying; "it was just frustration with a lot of bank accounts and complicated finances"). Indeed, she complained about missing records when she was, herself, in possession of the records. By contrast, Jerry compromised and accommodated over and over, making every effort to limit the time and cost of the dissolution. See, e.g., RP (Trial) 83 (offering her \$150000 of life insurance); 84-85 (compromising on house value); 87 and 101 (waiving separate property argument and taking loss on property bought for daughter); 101-105 (selling business and

⁵ RCW 26.09.140 provides:

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

working to facilitate transition); 107-108 (acknowledging wife's need for maintenance and expressing desire to help meet her needs); 143 (compromising on personal property distribution). Now, on appeal, Rebecca challenges the court's carefully exercised discretion, including with respect to issues she did not challenge below, and seeks to reinstate the marriage. The law is well established that intransigence will support an award of attorney's fees. *Fleckenstein v. Fleckenstein*, 59 Wn.2d 131, 133, 366 P.2d 688 (1961); *In re Marriage of Crosetto*, 82 Wn. App. 545, 563-564, 918 P.2d 954 (1996); *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989); *In Re Marriage of Mattson*, 95 Wn. App. 592, 605-06, 976 P.2d 157 (1999) (citations omitted).

Because Jerry cannot afford to spend his limited funds on attorney fees, and because Rebecca is being intransigent, she should pay his fees on appeal.

E. CROSS APPEAL

Jerry waives his cross-appeal.

F. CONCLUSION

For the foregoing reasons, Jerry Stewart respectfully asks this Court to affirm the trial court's decision and to award him fees on appeal.

Dated this 31st day of July 2009.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY

WSBA #13604

Attorney for Appellant

SCANNED 24

FILED IN OPEN COURT
1/30/09
WHATCOM COUNTY CLERK
By [Signature]
Deputy

IN THE SUPERIOR COURT OF WASHINGTON
COUNTY OF WHATCOM

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In re the Marriage of:)	NO. 08-3-00178-4
)	
REBECCA STEWART,)	FINDINGS OF FACT AND
Petitioner,)	CONCLUSIONS OF LAW
and)	(FNFL)
)	
JERRY STEWART,)	
Respondent.)	
)	

I. BASIS FOR FINDINGS

The findings are based on trial. The following people attended:
Petitioner, Petitioner's Attorney, Respondent, and Respondent's Attorney

II. FINDINGS OF FACT

Upon the basis of the court record, the court FINDS:

- 2.1 RESIDENCY OF PETITIONER.
The petitioner is a resident of the State of Washington.
- 2.2 NOTICE TO RESPONDENT.

FINDINGS OF FACT/CONCLUSIONS OF LAW
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CR 52; RCW 26.09.030; .070(3)
Page 1

ORIGINAL

69
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The respondent appeared, responded or joined in the petition and was served in the following manner: By personal service on March 5, 2008.

2.3 BASIS OF PERSONAL JURISDICTION OVER THE RESPONDENT.

The facts below establish personal jurisdiction over the respondent.
The respondent is presently residing in Washington.

The parties lived in Washington during their marriage and the petitioner and respondent continue to reside in this state.

2.4 DATE AND PLACE OF MARRIAGE.

The parties were married on July 6, 1968 at Mansfield, Texas.

2.5 STATUS OF THE PARTIES.

Husband and wife separated on March 5, 2008.

2.6 STATUS OF THE MARRIAGE.

The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition was filed and since the date the summons was served.

2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT.

There is no written separation contract or prenuptial agreement.

2.8 COMMUNITY PROPERTY.

The parties have real or personal community property as set forth in Exhibit "A". This exhibit is attached or filed and incorporated by reference as part of these findings.

FINDINGS OF FACT/CONCLUSIONS OF LAW
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2.9 SEPARATE PROPERTY.

The wife has no real or personal separate property.

The husband has real or personal separate property as set forth in Exhibit "A". This exhibit is attached or filed and incorporated by reference as part of these findings.

2.10 COMMUNITY LIABILITIES.

The parties have incurred community liabilities as set forth in Exhibit "A". This exhibit is attached or filed and incorporated by reference as part of these findings.

2.11 SEPARATE LIABILITIES.

The husband has incurred separate liabilities as set forth hereinafter and in the attached Exhibit "A".

The wife has incurred separate liabilities as set forth hereinafter and in the attached Exhibit "A".

2.12 MAINTENANCE.

The court has considered the length of the parties' marriage, the needs of the wife, the health of the parties, and the ability of the husband to provide maintenance. The court finds that the wife is unemployable and that she will need \$2,600 per month to meet her basic monthly needs. In consideration of the wife's needs permanent maintenance in the amount of \$1,800 should be ordered. The wife will supplement the difference between \$2,600 and \$1,800 from cash assets awarded to her in the Decree. The court has ordered that the wife be named the irrevocable beneficiary for \$300,000 under the whole life insurance policy which she will use to supplement her other cash assets to allow her to provide for her own support following the death of the husband. Maintenance should terminate on the death of either party "or the remarriage of the wife." Maintenance should commence on the first day of the month following entry of the decree.

** and the Court finds that the husband does not have the ability to pay \$2600/mo in light of his living and medical needs w/child support.*

FINDINGS OF FACT/CONCLUSIONS OF LAW
WPF DR 04.0300 (9/2000)
CR 52; RCW 26.09.030; .070(3)
Page 3

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2.13 CONTINUING RESTRAINING ORDER

Does not apply.

2.14 FEES AND COSTS.

Each party is capable of paying their own attorney fees and costs and no award should be made

2.15 PREGNANCY.

The wife is not pregnant.

2.16 DEPENDENT CHILDREN.

The parties have no dependent children of this marriage.

2.17 JURISDICTION OVER THE CHILDREN.

Does not apply because there are no dependent children.

2.18 PARENTING PLAN.

Does not apply.

2.19 CHILD SUPPORT.

Does not apply.

2.20 OTHER:

A. All of the property and obligations of the parties is set forth in Exhibits

FINDINGS OF FACT/CONCLUSIONS OF LAW
WPF DR 04.0300 (9/2000)
CR 52; RCW 26.09.030; .070(3)
Page 4

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appended hereto and by this reference incorporated herein as though fully set forth. All obligations of the parties are set forth in Exhibits appended hereto.

B. From the date of separation, any property of the parties acquired by either and not specifically mentioned herein should be the separate property of the party acquiring or having possession of said property.

C. Each of the parties should fully assume those obligations allocated to him or her and each should hold the other party harmless from any obligations awarded to him or her; and each should indemnify the other for any payments that the other has to make on payments not assigned to him or her.

D. From and after the date of separation, any earnings of the parties hereto are and should be the sole and separate property of the party earning the same. Neither party should be liable for any debts contracted by the other from and after said date, and each party should not incur any obligations of any kind which shall constitute a claim against the other or become a lien against the property of the other.

E. Each of the parties through whom a legal right of action is derived, which has not otherwise been awarded herein, should be awarded said causes of action. Further, each party should be awarded those rights and benefits not otherwise awarded herein, which were derived as a result of his or her past or present employment, union affiliation, United States or other citizenship and/or residence within a state, all of which include but are not limited to:

Various forms of insurance, rights of social security payments, welfare payments, unemployment compensation payments, disability payments, Medicare and Medicaid education benefits and grants, interests in health or welfare and all other legislated, contractual and/or derived through the activity of that specific party; provided, however, that said benefit or benefits have not otherwise been specifically awarded herein; and provided further, that marriage to the party through whose activity said benefits have been accrued shall not be an indirect basis for an award of that benefit.

F. Each of the parties should be divested from any claim or cause of action which he or she has against the other which accrued prior to the date of execution hereof:

G. The husband and wife should execute and deliver to the other party any documents necessary to complete and effectively accomplish the terms of these Findings.

FINDINGS OF FACT/CONCLUSIONS OF LAW
WPF DR 04.0300 (9/2000)
CR 52; RCW 26.09.030; .070(3)
Page 5

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2 In the event that legal descriptions are insufficient, each party should promptly execute
3 such new documents as may be required to effectuate these Findings. If either party
4 should fail to comply with this paragraph, the Decree should constitute an actual grant,
5 assignment and conveyance of property and rights in such manner and with such force
6 and effect as should be necessary to effectuate the terms of these Findings.

7
8 H. The husband is terminally ill with a rare and incurable form of liver cancer.
9 His life expectancy is approximately three and one half years. Upon advice of his doctor
10 that the court accepts it is advisable for the husband to substantially reduce his work
11 schedule as the stress of work adversely affects the husband's health. The wife has alleged
12 that the husband has secreted community assets. The court finds that the husband has not
13 transferred, secreted or acted in any untoward manner toward the wife in the management of
14 community assets.

15 I Each party received a pretrial distribution of cash in an equal amount. The
16 court finds that this distribution was requested by the parties and not contested.
17 Accordingly the distribution is confirmed.

18 III. CONCLUSIONS OF LAW

19 The court makes the following conclusions of law from the foregoing findings of fact:

20 3.1 JURISDICTION.

21 The court has jurisdiction to enter a decree in this matter.

22 3.2 GRANTING OF A DECREE.

23 The parties should be granted a decree.

24 3.3 DISPOSITION.

25 The court should determine the marital status of the parties, consider or approve
26 provision for the maintenance of either spouse, make provision for the disposition
27 of property and liabilities of the parties, make provision for any necessary
28 continuing restraining orders, and make provision for the change of name of any
party. The distribution of property and liabilities as set forth in the decree is fair

FINDINGS OF FACT/CONCLUSIONS OF LAW
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and equitable.

3.4 CONTINUING RESTRAINING ORDER.

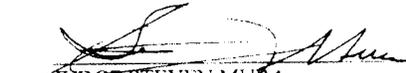
Does not apply.

3.5 ATTORNEY'S FEES AND COSTS.

Attorney's fees, other professional fees and costs should be paid.

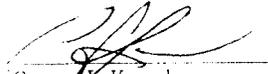
3.6 OTHER: None.

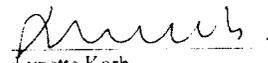
Dated: January 30, 2009


JUDGE STEVEN MURA

Presented by:

Approved for entry:
Notice of presentation waived:


Gregory A. Kosanke
W.S.B.A. #8936
Attorney for Respondent


Lynette Korb
W.S.B.A. #34346
Attorney for Petitioner

FINDINGS OF FACT/CONCLUSIONS OF LAW
WPF DR 04.0300 (9/2000)
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In re the marriage of:
Stewart v. Stewart
Whatcom County Cause No. 08-3-00178-4
Exhibit "A"- Property

COMMUNITY PROPERTY:

- A Household goods, furnishings and personal effects;
- B Bank accounts in the wife's name;
- C Bank accounts in husband's name;
- D Jewelry;
- E Real Property:
 - 1. 608 Forest Lane, Lynden, Whatcom County, Washington, 98264, legally described as follows: See attached Exhibit "1".
 - 2. 22014 Pinnacle Road, Glacier, Whatcom County, Washington, 98244, legally described as follows: See attached Exhibit "2"
 - 3. Real property located at 826 N. Park Street, Lynden, Whatcom County, Washington, legally described as follows: See attached Exhibit "3".
 - 4. Real property located at 11104 Welcome Road, Glacier, Whatcom County, Washington, legally described as follows: See attached Exhibit "4".
- F The following motor vehicles:
 - 1. 1999 Chevrolet Silverado Pickup;
 - 2. 2001 Chevrolet Suburban.
- G Business known as "Stewart Tax & Accounting" with a new value of \$203,750
- H IRA account in the husband's name in an approximate value of \$27,769;
- I IRA account in the wife's name in an approximate value of \$26,592;
- J People's Bank Certificate of Deposit in the present sum of \$51,799;
- K Whole Life Insurance policy;

EXHIBIT "A" - PROPERTY
Page 1 of 3

JS RS
JS RS

ORIGINAL

- L. Term life insurance policy insuring wife;
- M. Term life insurance policy insuring husband;
- N. Gold and silver;
- O. Insurance settlement of \$2,054;
- P. Business checking account in the approximate sum of \$996;
- Q. Floating CD in the approximate sum of \$216;
- R. Rights and benefits derived as a result of the parties' past or present employment, union affiliation, United States, or other citizenship and/or residency within a state, all of which include, but are not limited to: various forms of insurance, rights of social security payments, welfare payments, unemployment compensation payments, disability payments, Medicare, Medicaid, retirement benefits, profit sharing benefits, stock option benefits, sick leave benefits, educational benefits and grants, interest in health and welfare plans and all other legislated contractual and/or donated benefits, whether vested or non-vested, and/or directly or indirectly derived through the activity of that specific party.

WIFE'S SEPARATE PROPERTY:

- 1. Any property acquired by the wife after the date of separation, i.e., March 5, 2008

HUSBAND'S SEPARATE PROPERTY:

- 1. Any property acquired by the husband after the date of separation, i.e., March 5, 2008
- 2. Husband's inheritance in the approximate sum of \$67,571;
- 3. Real property located at 336 W. Homestead Blvd., #203, Lynden, Whatcom County, Washington, legally described as follows: See attached Exhibit "5".
- 4. Personal property inherited from his mother's estate.

EXHIBIT "A" DEBTS

COMMUNITY DEBTS:

- 1. Encumbrance on real property located at 608 Forest Lane, Lynden, Whatcom County, Washington;
- 2. Encumbrance on real property located at 22014 Pinnacle Road, Glacier, Washington;

EXHIBIT "A" - PROPERTY
Page 2 of 3

JS RS
JS RS

3. Encumbrance on real property located at 826 N. Park Street, Lynden, Whatcom County, Washington.

HUSBAND'S SEPARATE DEBTS:

1. Any debt incurred by the husband after the date of separation, i.e., March 5, 2008;
2. Encumbrance on real property located at 336 W. Homestead Blvd., #203, Lynden, Whatcom County, Washington.

WIFE'S SEPARATE DEBTS:

1. Any debt incurred by the wife after the date of separation, i.e., March 5, 2008.

EXHIBIT "A" - PROPERTY
Page 3 of 3


JS


RS

Escrow No. 3777



Chicago Title Insurance Company

THIS SPACE PROVIDED FOR RECORDER'S USE:

WHATCOM COUNTY
BELLINGHAM, WA
04/04/94 2:47 PM
REQUEST OF: A/LT
Shirley Forslof, AUDITOR
BY: TRR, DEPUTY
\$7.00 DEED
Vol: 382 Page: 35
File No: 940404208

FILED FOR RECORD AT REQUEST OF

JAMES A. WYNSTRA
ATTORNEY AT LAW
108 W. GROWER BY SUITE 101
POST OFFICE BOX 400
LYNDEN, WASHINGTON 98264-0400
(206) 354-6078

WHEN RECORDED RETURN TO

Name Mr. and Mrs. Jerry C. Stewart

Address 817 Eighth Street

City, State, Zip Lynden, WA 98264

W 32005

Statutory Warranty Deed

TORANTOR LEO POLKERTSMA and BETTY POLKERTSMA, husband and wife

THIS DEED IS PART OF AN EXCHANGE TO ENABLE THE GRANTOR HEREIN TO AVAIL THEMSELVES OF THE BENEFITS OF AN INTERNAL REVENUE CODE SECTION 1031 TAX DEFERRED EXCHANGE AND IS A DIRECT DEED FROM GRANTOR TO GRANTEE in hand paid, conveyed and warranted to JERRY C. STEWART and BECKY L. STEWART, husband and wife

the following described real estate, situated in the County of Whatcom, State of Washington:

LOT 25, "WOOD CREEK VILLAGE," ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 14 OF PLATS, PAGE 145, RECORDS OF WHATCOM COUNTY, WASHINGTON.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

SUBJECT TO: (1) LOCAL IMPROVEMENT DISTRICT ASSESSMENTS, IF ANY, LEVIED BY THE CITY OF LYNDEN; AND (2) CLAIM OF LIEN BY CITY OF LYNDEN FOR CONNECTION CHARGES TO SEWER LINE RECORDED NOVEMBER 22, 1978, UNDER WHATCOM COUNTY AUDITOR'S FILE NO. 1308250.

444 EX 20

Dated March 31, 1994

Leo Polkertsma Betty Polkertsma
Leo Polkertsma Betty Polkertsma

STATE OF WASHINGTON

STATE OF WASHINGTON

COUNTY OF WHATCOM

COUNTY OF

On this 31 day of March, 1994, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared LEO POLKERTSMA and BETTY POLKERTSMA to me known to be the President and Secretary, respectively, of the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on which stated that I was authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

GIVEN under my hand and official seal this 31 day of March, 1994.

James A. Wynstra
Notary Public in and for the State of Washington,
residing at Lynden

Notary Public in and for the State of Washington,
residing at

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor In Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the _____ COUNTY _____ (Type of Recording Jurisdiction)

of _____ (Name of Recording Jurisdiction)
TRACT B, STEWART LOT LINE ADJUSTMENT, ACCORDING TO THE MAP THEREOF,
RECORDED UNDER AUDITOR'S FILE NO. 94070802B, IN BOOK 30 OF SHORT PLATS,
PAGE 61, IN THE AUDITOR'S OFFICE OF WHATCOM COUNTY, WASHINGTON.
SITUATE IN COUNTY OF WHATCOM, STATE OF WASHINGTON.

Parcel ID Number: 400319 151343 0000 which currently has the address of _____ (Street)
608 Forest Lane _____ (City), Washington 98264 _____ (Zip Code)
Lynden _____ (Property Address).

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument; but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances STEWART, JERRY? 5014793-401 In State *Jerry B* 0

SAIWA100121

Page 3 of 15

Form 3048 1/01

2021202118
Page: 3 of 15
12/11/2002 12:18 PM
DOT 833.00
Whatcom County, WA

Request of: FIRST AMERICAN TITLE INSURANCE



2030305298
 Page: 1 of 8
 3/25/2003 2:08 PM
 DEED
 Whatcom County, WA
 Request of CHICAGO TITLE INSURANCE

After Recording Return to:
 Jerry C. Stewart
 906 Forest Lane
 Lynden WA 98294

Filed for Record at Request of
 CHICAGO TITLE
 INSURANCE COMPANY
 PO Box 1115
 1816 Cornwall Avenue, Suite 115
 Bellingham, WA 98225

Escrow No: 187319-HLE

Abbreviated Legal: Lot 14, Block 2, Mt Baker Rim Div. No. 2, a plat
 Additional Legal(s) on page:
 Assessor's Tax Parcel No.: 380708 500377 0000

STATUTORY WARRANTY DEED

THE GRANTOR Randy McCowan and Aggie McCowan, husband and wife, for and in consideration of TEN DOLLARS AND OTHER VALUABLE CONSIDERATION in hand paid, conveys and warrants to Jerry C. Stewart and Becky L. Stewart, husband and wife, the following described real estate, situated in the County of Whatcom, State of Washington:

Lot 14, Block 2, Mt Baker Rim Div. No. 2, according to the plat thereof recorded in Volume 12 of plats, Page 38, records of Whatcom County, Washington.

Situate in Whatcom County, Washington

Subject to Real Estate Taxes and Exhibit A attached hereto and made a part hereof

Dated: March 21, 2003

Randy McCowan

Aggie McCowan

STATE OF WASHINGTON
 COUNTY OF WHATCOM

I certify that I know or have satisfactory evidence that Randy McCowan and Aggie McCowan the person(s) who appeared before me, and said person(s) acknowledged that they signed this instrument and acknowledged it to be their free and voluntary act for the uses and purposes therein mentioned in this instrument.

Dated: March 21, 2003



Heidi L. Elder
 Notary Public in and for the State of Washington
 Residing at Bellingham
 My appointment expires: March 1, 2005

03:04 80006 3/26/2003 1,254.60 ***

EXHIBIT A

Easement disclosed on said plat;
For: 15' Screening Access - prohibiting easement
Affects: Said premises and other property

Easement, including its terms, covenants and provisions as stated by instrument;
Recorded: September 18, 1972
Recording No.: 1123592
In Favor Of: Governmental agency supplying
For: Utility Easement
Affects: 5 feet from each boundary line

Covenants, conditions, restrictions, assessments and easements, but omitting any covenant or restriction based on race, color, religion, sex, handicap, familial status, or national origin unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607 of the United States Code or (b) relates to handicap but does not discriminate against handicapped persons, in Declaration of Restrictions;
Recorded: September 18, 1972
Recording No.: 1123589
Affects: Said premises

Said instrument has been amended or modified by the following instrument;
Recorded: June 30, 1973, November 10, 1992 and July 26, 1995
Recording No.: 1140588, 921110103 and 950725006
Affects: Said premises

Notice of Bylaws;
Recorded: October 12, 1971, June 23, 1987 and June 22, 1994
Auditor's File Nos: 1102412, 1575878 and 940622077

Said instrument has been amended or modified by the following instrument;
Recorded: November 6, 1992, March 24, 1993, July 25, 1995 and July 2, 1996
Recording Nos.: 921106070, 930324233, 930324235, 930324238, 950725005, 930727124, 980702070 and 1981000537
Affects: Said premises and other property

Resolution;
Recorded: March 24, 1993, July 27, 1993, June 28, 1994, March 31, 1995, April 25, 1995, July 25, 1995 and July 2, 1996
Auditor's File Nos.: 930324235, 930324238, 930727123, 940628142, 950331065, 950425061, 950425062, 950425063, 950725007 and 960702069

The right to make all necessary slopes for cuts and fills and the right to continue to drain roads and ways over and across any lot or lots where water might take a natural course in the original reasonable grading of the roads and ways shown on plat all as dedicated in the plat. Following reasonable grading of roads and ways shown hereon, no drainage waters on any lot or lots shall be diverted or blocked from their existing course so as to discharge upon any public road rights of way, or to hamper proper road drainage. Any enclosing of drainage waters in culverts or drains or rerouting thereof across any lot as may be undertaken by or for the owner of any lot shall be done by and at the expense of such owner.

[Handwritten signatures]

2030305298
Page: 2 of 3
2/25/2008 3:02 PM
OCEC
Jettecon County, IA
Request of CHICAGO TITLE INSURANCE



2060800896

Page: 1 of 4
8/07/2006 2:08 PM
DEED
Whatcom County, WA

Request of: WHATCOM LAND TITLE

When recorded return to:

Jerry C. Stewart
608 Forest Lane
Lynden, WA 98264

Filed for Record at Request of
Lynden Escrow, Inc.
Escrow Number 00122

Grantor: Deboer T, LLC
Grantee: Jerry C. Stewart and Becky L. Stewart

Statutory Warranty Deed

W-87205 (4)

THE GRANTOR Deboer T, LLC, a Washington Limited Liability Company for and in consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION in hand paid, conveys and warrants to Jerry C. Stewart and Becky L. Stewart, husband and wife the following described real estate, situated in the County of Whatcom, State of Washington

Tax Parcel Number(s): 400317 049060 0000

Lot 5, PLAT OF PARKVIEW PLACE, ACCORDING TO THE PLAT THEREOF, RECORDED ON JULY 13, 2005, UNDER AUDITOR'S FILE NO. 2050702148, RECORDS OF WHATCOM COUNTY, WASHINGTON, SITUATE IN WHATCOM COUNTY, WASHINGTON

Subject to easements, restrictions and reservations as set forth in Exhibit A attached hereto and by this reference made a part hereof

Dated August 2, 2006

Deboer T, LLC

Theron DeBoer
By: Theron Deboer, Managing Member

STATE OF Washington)
County of Whatcom) SS

I certify that I know or have satisfactory evidence that Theron DeBoer

He are the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument, on oath stated that he/she/they is/are authorized to execute the instrument and acknowledge it as the Managing Member of Deboer T, LLC.

to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

Dated August 4, 2006



Kathy Bernagly
Kathy Bernagly
Notary Public in and for the State of Washington
Residing at Lynden
My appointment expires: 02/11/08

LPH 10-06(1-1)
Page 1 of 4

206373 125044 8/07/2006 5:05.02**

EXHIBIT "3"

Exhibit A

1. Covenants, conditions, restrictions, reservations and easements in declaration, including the terms and provisions thereof;

Executed by: BAY PROPERTY, LLC
Recorded: July 13, 2005
Recording No: 2050702149

2. Easement as delineated or dedicated on the face of said plat:
For: 5-foot utility, 10-foot utility, storm water facility, building envelope; 5-foot drainage and utility; 20-foot utility stormwater, and access for maintenance of spillway
Affects: Said premises

3. Notes per face of Plat of Parkview Place, as follows:

A. Declaration & Dedication

I, the undersigned, do hereby declare this plat and dedicate to the public forever all roads and ways shown hereon, with the right to make all necessary slopes for cuts and fills, and the right to continue to drain said roads and ways over and across any lot or lots where water might take a natural course in the original reasonable grading of roads and way shown hereon. Following original reasonable grading of roads and ways hereon, no drainage waters on any lots shall be diverted or blocked from their existing course so as to discharge upon any public road right-of-way, or to hamper proper road drainage, any enclosing of drainage waters in culverts or drains or rerouting thereof across any lot as may be undertaken by or for the owner of any lot, shall be done by and at the expense of such owner.

B. Plat Notes and conditions:

- 1) Only single family dwellings may be constructed on these lots (no multifamily buildings). This is not to prohibit detached garages, storage sheds, and other permitted accessory structures.
- 2) There shall be no setback variances granted for lots within this subdivision.
- 3) For additional plat covenants, conditions and restrictions, see CC&Rs recorded under Whatcom County Auditor's File No. 2050702149.
- 4) The City of Lynden landfill, located on Tract A, was closed prior to 1947.
- 5) There is a 5-foot drainage and utility easement along all interior lot lines of this plat.

C. Building Envelope Note

The building envelopes depicted hereon denotes the acceptable setbacks at the time of plat approval. Additional information is available at the City of Lynden Planning Department.

D. Stormwater Facility Setbacks:

The minimum setback from the edge of the stormwater facility depicted hereon shall be 20 feet.

4. Easement including the terms, covenants and provisions thereof, as granted by instrument;

Recorded: August 13, 1947
Recording No: 845920
Recorded at: Whatcom County, Washington
For: Concrete culvert drain
Affects: Portion of said plat
Continued...

Exhibit A

5. Easement including the terms, covenants and provisions thereof for electric transmission and/or distribution line, together with necessary appurtenances, as granted by instrument.
Recorded: March 29, 2004
Recording No: 2040305407
Records of: Whatcom County, Washington
To: PUGET SOUND ENERGY
Affects: Portion of said plat and other property
6. Easement including the terms, covenants and provisions thereof, as granted by instrument.
Recorded: September 15, 1993
Recording No: 930915003
Records of: Whatcom County, Washington
In favor of: CITY OF LYNDEN
For: Sewer line
Affects: Portion of said plat
7. Easement including the terms, covenants and provisions thereof, as granted by instrument.
Recorded: September 15, 1993
Recording No: 930915002
Records of: Whatcom County, Washington
In favor of: CITY OF LYNDEN
For: Sewer line
Affects: Portion of said plat
8. Easement including the terms, covenants and provisions thereof, as granted by instrument.
Recorded: July 14, 2004
Recording No: 2040702160
Records of: Whatcom County, Washington
In favor of: CITY OF LYNDEN
For: Temporary installation and maintenance easement and conservatory area
9. Easement including the terms, covenants and provisions thereof for electric transmission and/or distribution line, together with necessary appurtenances, as granted by instrument.
Recorded: March 2, 2005
Recording No: 2050300251
Records of: Whatcom County, Washington
To: PUGET SOUND ENERGY
Affects: Said premises
10. Terms and conditions of Ordinance No 1168.
Recorded: March 13, 2003
Recording No: 2030302390
11. North Park Short Plat, including the terms and conditions thereof.
Recorded: February 13, 1986
Recording No: 1529358
12. Bay Short Plat, including the terms and conditions thereof.
Recorded: June 20, 1994
Recording No: 940621205
13. Bay Lot Line Adjustment, including the terms and conditions thereof.
Recorded: January 8, 1998
Recording No: 1989200768
14. R C K Lot Line Adjustment, including the terms and conditions thereof.
Recorded: April 30, 2003
Recording No: 2030407255
15. Bay Property Lot Line Adjustment, including the terms and conditions thereof.
Recorded: July 19, 2004
Recording No: 2040703162

Exhibit A

16. Matters enclosed by a Survey of said premises;
Recorded July 21, 1999
In Volume 1 of Surveys, Page 35
Recording No 1990702403
Records of: Whatcom County, Washington

We note this record of survey depicts existing fence lines which are at variance with deed lines of record. Said fence lines may indicate a potential for claims and may be subject to issues of unwritten title.

Said Survey was originally recorded September 15, 1999, under Auditor's File No. 1990901456

17. Easement as delineated or dedicated on the face of said plat;
For 20-foot City of Lynden trail and utilities; small drainage swale, large drainage swale; and future public drainage facility area
Affects As delineated on Bay Short Plat
18. Easement as delineated or dedicated on the face of said plat;
For Drainage ditch
Affects As delineated on R.C.K. Lot Line Adjustment
19. Easement as delineated or dedicated on the face of said plat;
For 20-foot utility and 10-foot sewer easement
Affects As delineated on Bay Property Lot Line Adjustment
20. Easement as delineated or dedicated on the face of said plat;
For 30-foot ingress, egress and utilities
Affects As delineated on Survey recorded July 21, 1999, under Whatcom County Auditor's File No. 1990702403, records of Whatcom County, Washington

END OF EXHIBIT "A"...



2050703795
 Page: 1 of 2
 7/20/2005 11:05 AM
 DEED \$21.00
 Whatcom County, WA
 Request of: CHICAGO TITLE INSURANCE

After Recording Return to
 Jerry Stewart
 808 Forest Lane
 Lynden WA 98264

Filed for Record at Request of:
 CHICAGO TITLE
 INSURANCE COMPANY
 PO Box 1115
 1818 Cornwall Avenue, Suite 115
 Bellingham, WA 98225

Escrow No.: 188478-SLG

Abbreviated Legal: Lot 104, Block 1, Mt. Baker Rim, Division No. 1, a plat
 Additional Legal(s) on page:
 Assessor's Tax Parcel No.: 390708 256478 0000

STATUTORY WARRANTY DEED

THE GRANTOR John A. Appleby and Gail M. Appleby, husband and wife for and in consideration of TEN DOLLARS AND OTHER VALUABLE CONSIDERATION in hand paid, conveys and warrants to Jerry Stewart and Becky Stewart, husband and wife the following described real estate, situated in the County of Whatcom, State of Washington

Lot 104, Block 1, Mt. Baker Rim, Division No. 1, according to the plat thereof, recorded in Volume 11 of plats, Pages 74 75 and 76, records of Whatcom County, Washington.

Situate in Whatcom County, Washington.

Subject to Exhibit "A" attached hereto and by this reference made a part hereof.

Dated: July 18, 2005

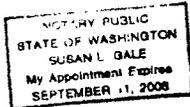
John A. Appleby
 Gail M. Appleby

STATE OF WASHINGTON
 COUNTY OF WHATCOM

I certify that I know or have satisfactory evidence that John A. Appleby and Gail M. Appleby the person(s) who appeared before me, and said person(s) acknowledged that they signed this instrument and acknowledged it to be their free and voluntary act for the uses and purposes therein mentioned in this instrument.

Dated: July 18, 2005

Susan L. Gale
 Notary Public in and for the State of Washington
 Residing at Bellingham
 My appointment expires: September 11, 2008



310423 111957 7/20/2005 \$50.00 ***

Exhibit "A"

Easement, including its terms, covenants and provisions as granted by instrument;
Recorded: October 12, 1971
Recording No.: 1102413
In Favor Of: Governmental Agency Supplying Utility Services
For: Utility easements
Affects: Five feet from each boundary line

Covenants, conditions, restrictions, assessments and easements, but omitting any covenant or restriction based on race, color, religion, sex, sexual orientation, handicap, familial status, or national origin, marital status, disability, ancestry, or source of income unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607 of the United States Code or (b) relates to handicap but does not discriminate against handicapped persons. In Declaration of Restrictions;
Recorded: October 12, 1971
Recording No.: 1102414
Affects: Said premises

Said instrument has been amended or modified by the following instrument:
Recorded: September 18, 1972, November 10, 1992 and July 25, 1995
Recording No.: 1123590, 921110103 and 950725006
Affects: Said premises

NOTICE OF BYLAWS:
Recorded: October 12, 1971, June 23, 1987 and June 22, 1994
Auditor's File No.: 1102412, 1575978 and 940822077

Said instrument has been amended or modified by the following instrument:
Recorded: November 6, 1992, March 24, 1993, July 25, 1995 and July 2, 1996
Recording No.: 921106070, 930324233, 930324235, 930324238, 950725005, 930727124, 960702070 and 1981000537
Affects: Said premises and other property

RESOLUTION:
Recorded: March 24, 1993, July 27, 1993, June 28, 1994, March 31, 1995, April 25, 1995, July 25, 1995 and July 2, 1996
Auditor's File No.: 930324235, 930324238, 930727123, 940828142, 950331085, 950425081, 950425082, 950425083, 950725007 and 960702069

Agreement, including its terms, covenants and provisions;
Between: Lands-West, Inc., A Washington Corporation and Mt. Baker Rim Community Club
Dated: January 16, 1975
Recorded: January 16, 1975
Recording No.: 1180097 and 1180098
Regarding: Transfer and conveyance of title to whatever community sewer system shall be built in the area within 10 years, to the record of which is made for further particulars

The right to make all necessary slopes for cuts and fills and the right to continue to drain roads and ways over and across any lot or lots where water might take a natural course in the original reasonable grading of the roads and ways shown on plat all as dedicated in the plat. Following reasonable grading of roads and ways shown hereon, no drainage waters on any lot or lots shall be diverted or blocked from their existing course so as to discharge upon any public road rights of way, or to hamper proper road drainage. Any enclosing of drainage waters in culverts or drains or rerouting thereof across any lot as may be undertaken by or for the owner of any lot shall be done by and at the expense of such owner.



2080402819

Page: 1 of 3
4/21/2008 3:34 PM
DEED 844.00
Whatcom County, WA

Request of: CHICAGO TITLE INSURANCE

After Recording Return to:
Jerry Stewart
1943 D Front Street
Lynden WA 98284

Filed for Record at Request of
CHICAGO TITLE
INSURANCE COMPANY
P.O. Box 1115
1610 Carmel Avenue, Suite 115
Bellevue, WA 98005

Escrow No: 30001-HLE

STATUTORY WARRANTY DEED

THE GRANTOR Christine C Reid, a single person for and in consideration of TEN DOLLARS AND OTHER VALUABLE CONSIDERATION in hand paid, conveys and warrants to Jerry Stewart, a married man as his separate estate the following described real estate, situated in the County of Whatcom, State of Washington:

Unit No. 203, Building 336, of Island Green Commons Condominium 2nd Amendment, according to the declaration thereof, recorded September 2, 2005, under Auditor's File No. 2050900348, and any amendments thereto, records of Whatcom County, Washington.

Situate in Whatcom County, Washington

Subject to Real Estate Taxes and Exhibit "A" attached hereto and by this reference made a part hereof

Submitted Legal: Unit 203, Building 336, Island Green Condominium 2nd Amendment
Additional Legal(s) on page:
Assessor's Tax Parcel No. 400317 248407 0007

Dated: April 18, 2008

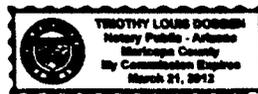
Christine C Reid

STATE OF ARIZONA
COUNTY OF Whatcom

I certify that I know or have satisfactory evidence that Christine C Reid (hereinafter the person(s) who appeared before me, and said person(s) acknowledged that she signed this instrument and acknowledged it to be her free and voluntary act for the uses and purposes therein mentioned in this instrument.

Dated: 4-19-08

Notary Public in and for the State of Arizona
Residing at
My appointment expires



306495 141345 4/21/2008 3974.40 *

EXHIBIT "5"

EXHIBIT A

Covenants, conditions, restrictions, assessments and easements, in Declaration of Restrictions.

Recorded: September 2, 2005
Recording No.: 2050900348

Said instrument has been amended or modified by the following instrument:

Recorded: October 28, 2005 and May 5, 2008
Recording No.: 2051005508 and 2080501052

Easement, including its terms, covenants and provisions as granted by instrument:

Recorded: July 8, 1985
Recording No.: 1510974
In Favor Of: Continental Telephone of the Northwest, a Washington corporation, its successors and assigns
For: To construct, operate, maintain, replace and remove such aerial and underground telephone, telegraph and communication structures
Affects: Said premises

Ordinance of the City of Lynden providing Annexation to the City of Lynden

Recorded: December 9, 1991
Recording No.: 911208183
Ordinance No.: 895
Affects: Said premises and other property

Easement, including its terms, covenants and provisions as granted by instrument:

Recorded: May 26, 1995
Recording No.: 950528054
In Favor Of: Puget Sound Power and Light Company
For: Underground distribution and electric lines and appurtenances thereto
Affects: Said premises and other property

Easement, including its terms, covenants and provisions as conveyed by instrument:

Recorded: September 8, 1995
Recording No.: 950906430
In Favor Of: Roger K. Dykstra and Carol A. Dykstra, husband and wife; Kenneth A. Shagren and Kathy Shagren, husband and wife; Glen H. Shagren and Audrie Shagren; husband and wife; and William McGowan and Judy McGowan, husband and wife
For: Storm Drainage
Affects: Said premises and other property

Agreement, including its terms, covenants and provisions:

Between: Homelead Northwest, Inc.; Henry Shagren and Eleanor Shagren, husband and wife; Nellie Shagren, a widow; and Whatcom County
Recorded: October 30, 1997
Recording No.: 1871003867
Regarding: Open space taxation agreement, hold harmless agreement, public access affidavit of posting open space sign, agreement with Lynden School District No. 504, and construction easement
Affects: Said premises and other property

Said instrument is a re-recording of instrument:
Recorded: November 25, 1996
Recording No: 981125123

Easement, including its terms, covenants and provisions as granted by instrument.
Recorded: November 27, 2001
Recording No.: 2011103798
In Favor Of: Puget Sound Energy, Inc., a Washington corporation
For: Electric transmission and/or distribution line
Affects: Said premises and other property

Easement, including its terms, covenants and provisions as granted by instrument.
Recorded: August 18, 2005
Recording No.: 2050803262
In Favor Of: Puget Sound Energy, Inc., a Washington corporation
For: Electric transmission and/or distribution line
Affects: Portion of said premises

Covenants, Conditions, Restrictions, Easements, Notes, Dedications, Agreements and Set
Backs, if any, set forth in or delineated on Island Green Commons, a Condominium, as
Recorded under Auditor's File No. 2050900348, a copy of which is attached.

Easement, including its terms, covenants and provisions as granted by instrument:
Dated: August 11, 2005
Recorded: April 10, 2007
Recording No.: 2070401529
In Favor Of: Comcast of Washington IV, Inc.
For: Certain broadband communications services

Lien of assessment levied pursuant to the Declaration of Condominium for Island Green
Commons Condominium, recorded under Auditor's No. 2050900348, and any amendments
thereto, to the extent provided for by RCW 64.34.