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COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

TAMRA ROBINSON

APPELLANT

v.

TERRY ROBINSON

RESPONDENT

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

1.1 Aggregate value of errors is significant.

The Husband argues that individual items to which the Wife assigns error are insignificant and thus should be ignored. But the aggregate value of these mistakes amounts to **\$34,500**, plus a \$117,000 difference in maintenance, a total of **\$151,597**.

Item	Trial court	If corrected	Difference	Net to Tamra
<i>Property divided</i>				<i>Assumes 50%</i>
Volvo	all CP	Tamra's SP	\$(11,000.00)	\$ (5,500.00)
Post-sepn CP expenses	ignored	CP	\$ (9,147.00)	\$ (4,573.50)
Check rec'd by Terry	ignored	\$ 611.00	\$ (611.00)	\$ (305.50)
Value of Suburban	\$ 9,535.00	\$ 4,000.00	\$ (5,535.00)	\$ (2,767.50)
Business liability	\$ 39,648.00	\$ 31,644.00	\$ (8,004.00)	\$ (4,002.00)
Owed to business ptr	\$ 20,000.00	\$ 6,253.00	\$(13,747.00)	\$ (6,873.50)
Business account funds	no mention	\$ 21,150.00	\$(21,150.00)	\$ (10,575.00)
Total property errors				\$ (34,597.00)
Maintenance duration	24 months	42 months	\$ 54,000.00	\$ (54,000.00)
Mtc + suppt amount	4,500/mo	6,000/mo	\$ 63,000.00	\$ (63,000.00)
TOTAL errors disfavoring Wife				\$(151,597.00)
<i>Economic considerations</i>				
Post-sep'n earngs by H	No amount	\$138,821.00		
Post-sep'n earngs by W	No amount	\$ 3,163.00		
Total fees owed by H (incl of 40K loan/fees)	\$ 64,375.00			
Net SP to H	\$(36,912.00)			
Net SP to W	\$(58,412.00)			

Taken as a whole, the Wife's bases for appeal should not be

disregarded as insignificant nit-picking. Justice and equity was not done when the court considers the entire circumstances resulting from the erroneous characterization, valuation and division of property. In this regard, the Robinsons differ from the situation in *Marriage of Pilant*, 42 Wn. App0. 173, 709 P.2d 1241 (1985), where a single item of nominal significance was raised on appeal in an estate of over \$550,000.

1.2 No evidence cited in the record to show that trial judge knew and understood post-dissolution economic circumstances to each as a result of decision.

The only citation the Husband relies upon in this regard is the fact that Judge Lum referenced “50%” of the marital estate would end up to each party, but in context, it’s clear that even this was not his initial intent and that he had no understanding about how much that meant either party would receive, nor how or whether that would leave them in equitable positions given the disparity in income, even after maintenance was paid. Stating a percentage is not the same as “finding” what the financial reality will be for each party. Terry concedes this in stating: “The only uncertainty was the exact amount that each party would receive from the net proceeds of the family residence when it was sold.” *Response Brief*, page 2. This “single” uncertainty amounts to 50% of the entire community estate (based on

then-estimates of market value and liabilities, \$273,125 of \$551,000 total CP estate value, Exhibits 202, 218, 29, *Appellate Brief*, 32). Given, too, the upheaval in the real estate industry, the court had even less reason to know or understand how each party would be left after trial.

1.3 The court made no finding that Terry was more credible than Tamra.

The Husband argues that the court found him to be more credible than Tamra. There is no such Finding on any particular item of in regard to the testimony of either party as a whole. In the case cited by Terry regarding credibility, *Marriage of Woffinden*, 33 Wn. App. 326, 654 P.2d 12199 (1982), the appellate court reversed the findings of the trial court as to the fitness of a parent (even after an acknowledged sexual relationship with his daughter), relying not on credibility but on the content of the testimony in the record. As to the Suburban value, no “fair-minded, rational person” would accept an unsupported “could be” over a well-articulated, industry-issued published current value of a vehicle (i.e., Kelley Blue Book). Terry’s testimony is not “substantial evidence” supporting the value asserted.

Nor is his blanket denial, without further explanation, substantial in regard to the characterization of the Volvo (i.e., whether it was intended as a gift to Tamra). Evidence must be of “sufficient

quantity,” not just “anything.” *Marriage of Griswold*, 112 Wn. App. 333, 48 P.3d 1018 (2002). Terry’s brief cites no authority upon which the court can give any weight to the fact that the Volvo was put into his name to prove intended characterization. This factor fails under *Estate of Borghi*, 167 Wn.2d 479, 490, 219 P.3d 932 (2009). Moreover, he appears to suggest in citing to RCW 26.16.030(2) that Tamra’s consent was required for her to be the recipient of a gift of community property. RCW 26.16.030(2) allows for “express or implied” consent and certainly, Tamra arguing and testifying that she understood that the Volvo was a gift to her is sufficient to imply that she consented to this transfer to her as a gift.

1.4 Husband confuses nature of expenses requested.

The Wife clearly set out specific expenses that were undisputably for community benefit. The Husband does not address these for what they are, but simply states that if these are considered, all of his other post-separation payments should be considered too. This simply misleads the court from the issue that is raised. There is no assertion on Tamra’s part that all of her post-separation expenditures be reimbursed or paid or considered—those are presumed the separate obligation of each spouse and thus to be paid from resources assigned to each spouse, such as temporary maintenance (in this case, the payments the parties agreed to, without a court order). The expenses

itemized by Tamra were not “ordinary” expenses, but incurred for a specific community purpose and as such, should have been borne by both parties in some equitable fashion instead of by her alone. She asks that they be credited to her as a community debt so as to reach an equitable offset when the overall division is accomplished. See *Appellant’s Brief, page 18 for details, not otherwise repeated here.*

If the Husband incurred or bore a similarly unallocated, unaddressed expense for community benefit, that would be an “apples to apples” comparison, but what he throws out in his response brief is not comparable to the Wife’s claim in nature and should be disregarded. (Essentially, he wants to count the “expenses” he paid under the parties’ agreement as to temporary allocation of income—payments he elsewhere describes as “maintenance.” (*Response Brief, page 2: “eleven months of maintenance that she received before the parties’ decree was entered.”*) The duplicity in this approach should be obvious—he cannot be credited for “maintenance”-type payments from which day-to-day living expenses were paid and also claim those as CP expenses for purposes of a balanced property division.)

Contrary to the Husband’s assertions, the trial court does have authority to consider payments made by each party, even those after separation. *Lucker v. Lucker*, 71 Wn. 2d 165, 168 (1967) (court increased judgment to appellant after consideration and credit for

payments made during 7-year separation before trial, as well as other property omitted).

1.5 Valuation of property must include appreciation and depreciation.

Terry argues that the court had authority to choose the date of valuation, but cites no authority that allows the court to choose different dates of valuation for different assets. Choosing a March 2009 value for the Suburban (Exhibit 8), for example, and a July 2009 value for the business equity (brought current as of trial through expert testimony, RP 391, contrary to Terry's assertion, *Response Brief*, page 3) is inconsistent and nowhere supported in the Husband's authorities. Rather, with a single valuation date, such as the date of trial (instead of separation), the trial court must consider both appreciation and depreciation through that date. ***Lucker***, at 168. The value of the Suburban had depreciated at the time of trial; the value of the business had appreciated. There is no specific finding in the record indicating a chosen valuation date. There is no explanation for valuing the asset as of trial and the liability associated with the same asset at an earlier date. The Husband does not address this in his Response and further does not dispute that the Robinsons' portion of the debt was 90% and not the full 100%. There was no evidence to support the liability value used by the court (\$39,648).

1.6 Terry's debt to business analysis omits amended K-1 forms.

Terry cites to testimony about various debts (unauthorized expenses to the company), but ignores entirely the effect of the tax records that shows how those were addressed. By amending the K-1 form, the "unauthorized expenses" became income received by Terry (thus no longer a "debt"). Based on the records provided, the sums outstanding to the business total no more than \$6,252.89. See *Appellant's Brief*, page 23. Terry's cite to the record does not erase the tax records the business relied upon which verifies what was actually done. (Even if \$20,000 were owed to the business, taking into account the Robinsons' 45% interest, only \$11,000 would remain owing to anyone but themselves, i.e., Mr. Scharhon, the 55% owner.)

Terry's argument on page 13 of his Response Brief does not track with the record—he says Ms. Saunders testified to unauthorized personal expenses, but cites to Mr. Mulholland's testimony at RP 355. In that testimony, Mr. Mulholland is asked to speculate as to "whether" there were additional personal expenses, but no figure amount or firm identification of said expenses is present in the question or answer. In fact, he states "I have no proof that any of these are—are correct or not." RP 355. This citation to the record does not support Terry's argument. Nor is there anything in Exhibit 45 that reflects the sum

stated in Terry's Response Brief, \$9,129.99, which supposedly is intended to be added to \$11,368 to reach the \$20,000 debt to the business. But Mr. Mulholland also affirmed the new K-1 Forms that were issued to address these expenses, converting them to income (see explanation in Appellant's Brief, page 23). RP 344. The record does not say what Terry is reporting.

1.7 Evidence of back problems can be a potential limitation to Wife's earning capacity

Tamra works one 12-hour shift per week (RP 56) plus 12 hours a month (two Saturdays, six hours each). Her "part-time" work was a total of 60 hours per month—37.5% of a standard 40-hour work week. She also testified "because I have . . . back issues. And that I deal with . . . chronic back pain, that doing bedside care . . . may be limited for me because it's so strenuous." RP 46. Her ability to do some non-strenuous work is contingent on receiving her Master's and finding a teaching-type position, a prospect not in her near future. RP 46.

1.8 Minimal maintenance is historically upheld in cases where spouse receives a disproportionate share of property.

Terry cites to *Marriage of Rink*, 18 Wn. App. 549, 553, 571 P.2d 210 (1977) for the rule that a court can consider its maintenance award in making a property division and vice versa. The scenario that plays out in *Rink* and other cases is that were shorter periods of

maintenance are awarded, the recipient spouse in those cases also receives a disproportionate award of property. In *Rink*, in particular, the Wife was awarded 12 months of maintenance after trial, along with 2/3 of the community estate. In *Marriage of Luckey*, 73 Wn. App. 201, 210, 868 P.2d 189 (1994), no maintenance was awarded because the property division was unequal in the Wife's favor and the Wife was able to find full-time work soon after trial.

In *Hogberg v Hogberg*, 64 Wn.2d 617 (1966), in a 50/50 property division, maintenance to the Wife was initially ordered for a total of 18 months following a 10-year marriage, but was modified on appeal to have no termination date until a change of circumstances occurred. The trial court was found to have abused its discretion by speculating in regard to the wife's future ability to earn a livelihood.

Likewise the appellate court in *Dickison v Dickison*, 65 Wn.2d 585 (1965) increased an award of maintenance (from \$100/month to \$175/month) for a 3-year period following a 13-year marriage. It also "corrected" the property division so as to give the Wife more than 50% of the community property and increased the attorney fees and costs awarded to her (adding \$250 to the \$750 awarded). Tamra's request for 3½ years of maintenance following a 14-year marriage is also just.

Following this approach, where Tamra was to receive just 50% of the community estate, it follows that the maintenance awarded to

her should have been for a greater duration or, if minimal (as the court ordered—24 months), a greater-than-50% share of the community estate should have been awarded to her (or both). The court instead left Terry in a substantially greater financially secure position with his \$180,000 annual income and an accompanying ability to accumulate property than Tamra can ever hope to achieve, even though Terry's earning capacity was achieved entirely within the context of the marriage and the joint sacrifices the parties made together, but which Tamra now cannot undo. Terry appears to agree with this balancing approach (maintenance versus property), because he states that the "award of spousal maintenance was not an abuse of discretion, especially in light of the disproportionate award to the wife." (Response Brief, 3-4.) Yet there was no disproportionate award to the Wife—on page 2 of his brief, he refers to the "equal division" that was intended by Judge Lum. So in Terry's own logic, more property is due Tamra in light of the maintenance that was awarded.

Conversely, without knowing "how much" property Tamra was to receive (see above), the court could not have correctly and completely analyzed Tamra's need for maintenance in setting a "fair" amount or duration. Thus it failed to do what the statute (RCW 16.09.090) and *Rink* require: take into account the maintenance and property award together in fashioning a fair and equitable economic

result for both parties.

1.9 **Maintenance is not solely rehabilitative.**

The authority cited by Terry in support of a short-term maintenance obligation until Tamra graduates is but a single piece of the maintenance analysis and not an exclusive limiter. Nor is there evidence to suggest that she will be self-supporting even if she obtains employment as she hopes. Income of \$40,000/year will not meet all of her expenses, even with child support: \$7,493/month including debt payments, \$6,443 without (Exhibit 35). See Appellant's brief at 33-41 for a more complete analysis which Terry's Response Brief does not refute, but which is not repeated herein.

"The future earning capabilities of the wife, if she has no other means of support, represent one of the important concerns of the courts in divorce cases, and must be considered in comparison to those of her husband. It would be manifestly unjust to leave the wife and children with a low and uncertain standard of living while the husband retains a much higher one." *Stacy v Stacy*, 68 Wn.2d 573 (1966). In *Stacy*, the court doubled the sum of maintenance that was awarded over 5 years following a 22-year relationship and adjusted other awards and timelines to "ameliorate the inequities" present in the trial decision—even when 75% of the property had been awarded to the Wife, and even assuming the Wife was healthy and able to enter the workforce

(albeit at much lower wages than her husband). This court is asked to do the same for Tamra Robinson.

1.10 **Terry concedes fees and loan are the same obligation.**

There appears to be no dispute but that Terry's attorney fees were covered by the loan from his father (\$40,000) and that the total fees outstanding (CP 62) were reduced by payment of this sum.

Inequity. Where the court notes an abuse of discretion which fosters an inequity, the appellate court will correct the decree in such a way as to remove or ameliorate such inequities. *Lucker*, 71 Wn.2d 165, 167 (1967).

1.11 **No evidence that check funds did not exist.**

Terry did not deny receiving the \$611 check nor did he argue or testify that those funds no longer existed. Terry's Financial Declaration (Exhibit 3) disclosed bank account balances of \$1,000, a sum sufficient to represent the funds from this check. His failure to produce current bank statements should result in an inference against him that had they been favorable to his position, he would have produced them. *Henderson v. Tyrell*, 80 Wn. App. 592, 606, 910 P.2d 522 (1996).

1.12 **Corporation funds of \$40,000 not accounted or assigned.**

While Terry states in his Response Brief that these funds were

considered as part of the business evaluation, he provides no citation to the record to support this assertion. Exhibit 15, the business evaluation does not include these sums in the calculation of value. Tamra did not assert that the full \$40,000 to \$47,000 is to be assigned, but only the Robinson 45%, which Terry likewise calculates.

1.13 Value of post-separation earnings a critical part of the overall economic situation of both parties.

Given the significant disparity in earnings of the parties, the court could not have adequately understood their respective financial positions without making this finding. It is not a minute amount, but substantial since Terry's earnings (over \$180,000/year) alone would be more than a third of the total community estate. In *Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977), the valuation of assets that was omitted from a financial statement were nevertheless known to the court through testimony in the record. Items of "insignificant value" compared with other assets (personal effects) were not taken into account and no error was found. The sum of \$151,000 is significant in the overall outcome of the present case; this is not a matter of failing to value personal effects.

1.14 Intent for "rental value" should be clarified.

Tamra is content to accept Terry's interpretation of the "rental

value” finding as to the family home. He appears to agree that no rental value should be “charged back” to Tamra from the proceeds when the home is sold.

1.15 Credit for \$1,000 on Chase Visa to be included in overall division.

Likewise, Tamra accepts Terry’s assertion that credit to her is to be included in the overall totals for paying this debt, subject to the characterization of the asset; if her separate property, then Tamra is due a right of reimbursement from the community.

1.16 No authority to waive existing statute at time Child Support Order was entered.

While the record is clear that parties’ counsel and the court chose an expedient manner of resolving the issue of the new child support tables, Terry cites no authority granting either the parties or the court to waive application of the support tables currently in effect at the time the Order was signed. Nor does he cite any authority requiring either party to affirmatively assert the application of existing law. Even if a “package” was intended (a total of child support and maintenance), the allocation of income is affected, as are the tax implications of a different apportionment between maintenance and

child support.

1.17 Inaccurate calculation of income affects child support and maintenance.

The court's failure to accurately calculate the Father's income, to include contract-related benefits and then credit him for the children-only portion of health insurance costs affected the court's findings about the Father's ability to pay child support that exceeded the economic table as well as the amount of maintenance, based on income available to the Father. Only with a correct understanding of the Father's income could the court appropriately determine his ability to pay maintenance, as well as a support level commensurate with the parties' respective incomes and standard of living.

1.18 No useful analysis regarding tax exemptions.

The court made no findings to support the allocation of three to the Father and one to the Mother and Terry's brief does not cite to anything in the record to support this decision. The authority cited by Terry affirms the trial court's authority to allocate tax exemptions, but is not helpful in the least regarding the appropriate analysis or findings to support any particular allocation. *Marriage of Peacock*, 54 Wn. App. 12, 771 P.2d 767 (1989). Given the tax ramifications to

both parties (a significant deduction available to Terry for maintenance), there is nothing in the record to explain the court's reasoning for this award.

1.19 Attorney's fees could have been paid from Father's excess income.

As set forth in Tamra's *Appellate Brief* on page 11-12, and 38, Terry had \$2,805/month leftover outside of his monthly expenses and payments (including those for Tamra) before trial and had \$6,800/month from which to pay maintenance and support after trial. From this ongoing surplus income, there was ability for Terry to pay toward Tamra's fees. Terry does not dispute those calculations in his *Response Brief*. For the same reasons, as well as those articulated earlier, fees should be awarded to Tamra on appeal.

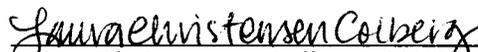
Terry's claim to have no ability to pay for attorney's fees on appeal calls into question (a) whether he wrote the brief himself, as a pro se litigant or in fact has had the assistance of counsel; and (b) whether his Motion for a second extension of time on the basis of being without counsel was truthful or just a guise to allow his attorney yet more time to respond. Regardless, if he doesn't have counsel, he doesn't have attorney fees on appeal, and thus has no complaint. If the converse is true, he has not been honest with this court.

II. CONCLUSION

Far from frivolous, Tamra's appeal points out a myriad of errors and oversights by the trial court which resulted in an inequitable result in so many aspects that the whole is greater than the sum of its parts. For purposes of this appeal, she asks no more than the sum of those parts.

DATED this 29th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the ~~28th~~ ^{29th} day of ~~May~~ ^{September}, 2010, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by US Mail:

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