

No. 64514-5-1

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

PETER GARRISON,

Appellant,

v.

SEKIKO SAKAI GARRISON,

Respondent.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

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I. INTRODUCTION

Appellant Peter Garrison appeals this dissolution decree, findings of fact and conclusions of law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding of fact 2.15 and in ordering Mr. Garrison to pay \$24,537 of Ms. Garrison's attorneys fees, in finding her fees were \$49,075 and that Mr. Garrison was "intransigent."¹
2. The trial court erred in findings of fact 2.12 and in denying maintenance to Mr. Garrison, erred in finding he can resume a high income "as soon as [this litigation ends and] he returns to the workforce" and in finding he was voluntarily unemployed and in imputing income to him of \$5,000 a month.
3. The trial court erred in requiring Mr. Garrison to pay child support and in finding of fact 2. 20 that he is "voluntarily under-employed," and \$5,000 a month income should be imputed to him.
4. The trial court erred in denying maintenance.
5. (a) The trial court erred in its decree, conclusions and finding of fact 2.8 (1), that the value of the marital home was \$700,000 (proposed by Ms. Garrison) and not \$987,5000 (proposed by Mr. Garrison); and erred in

¹ CP 855, 856, 861. The findings of fact and conclusions of law are at CP 852 et seq.; the statement calculating the net payment to Mr. Garrison is at 861; the final decree is at CP 862 et seq.

the resulting amount of the payment made to Mr. Garrison at CP 861 and 863. (b) The trial court committed error of law and abused its discretion in excluding the \$987,5000 value Mr. Garrison offered through a real estate broker opinion; the trial court mis-read RCW 18.140.020(6). (c) The trial court abused discretion in admitting the \$700,000 value opinion Ms. Garrison's witness offered. (d) The trial court abused discretion in excluding evidence Mr. Garrison offered to rebut that opinion. (e) The trial court erred in finding \$700,000 instead of \$987,900, where Ms. Garrison's appraiser's testimony and methods indicated no reasonable person would rely on his \$700,000 value.

6. The trial court erred as its final decree, conclusions and findings were based on impermissible findings of marital fault.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was awarding fees an abuse of discretion? (Assignment of Error No. 1).
2. Was there abuse of discretion in denying maintenance ?
(Assignments of Error nos. 2-4).
3. Was there abuse of discretion as to evidence rulings, and lack of substantial evidence supporting the \$700,000 valuation where RCW 18.140.020 did not bar Mr. Garrison's real estate broker's opinion; Ms. Garrison's appraiser's opinion lacked foundation, and was based on

comparables that excluded the most relevant, 180-degree homes from the immediate Innis Arden area close to the Garrison home, was based on an arbitrary decision to screen out all homes over \$850,000, relied on sales data from Ballard area and Magnolia in Seattle, miles away, and had other clear flaws disqualifying the opinion ? (Assignment of Error. No. 5).

4. Whether this outcome was decided based on marital fault, contrary to law ? (Assignments of Error 1-6).

IV. STATEMENT OF THE CASE

The parties were married July 9, 1994 and the petition for dissolution was filed in March 2008, CP 853. Trial was set for February 2009. In November, 2008 the trial court granted Mr. Garrison's motion for a continuance and reset trial for April 2009. CP 243, 246. In February the court ordered another continuance at his request and reset trial for September 2009. CP 269, 271.

In June 2009, Mr. Garrison asked to access part of the \$122,000+ in credit available in the parties' home equity line of credit (HELOC), citing his financial needs for living and legal fees. CP 280, 281. He noted the home would need to be sold to pay him at the end of the case. CP 283-284. He showed his income in 2007-2008 was only \$19,000. CP 285. In July 2009 the court ruled neither party should draw on the HELOC, and ruled neither party should receive fees. CP 593, 594. The reason for

denying Mr. Garrison's request to draw credit was "it is too close to trial." CP 594. Mr. Garrison then sought a trial continuance to allow time to draw on the HELOC. CP 600. Ms. Garrison opposed this and submitted a declaration on July 28, 2009 showing she had \$1,800 in fees for opposing this motion. CP 668-669. On July 30, 2009 the trial court (Hon. Patricia Clark) denied the motion for a continuance and other relief, noted Mr. Garrison's counsel was withdrawing, and reserved the request for fees. CP 742, 747-748. The court estimated trial would take 3-4 days. CP 741.

Thereafter Mr. Garrison proceeded pro se. CP 803. The trial occurred on September 15, 16, 17 and 21, 2009 and covered parenting issues, value of the home and facts relative to maintenance.

Value of the home. Mr. Garrison asked the court to value the home at a million dollars, RP 9/21/09 at 77. He testified this meant the home equity was \$460,000, and not \$160,000 as Ms. Garrison contended, based on her proposed valuation of \$700,000. *See* RP 9/21/09 at lines 1-3. Mr. Garrison said if Ms. Garrison could not buy him out post-trial, they should sell the house to "put ourselves on the same side of the table." RP 9/21/09 at 78 lines 1-8. Facts relative to the value of the home and evidentiary rulings are provided in the Argument section below.

Maintenance; earnings of the parties. The earning power of the two parties and their relevant circumstances were in issue, as Mr. Garrison

requested \$4,000 a month maintenance.² Ms. Garrison is a successful finance systems professional and entrepreneur.³ In 2008 Ms. Garrison earned \$137,000 (CP 855) which equates to \$11,416.66 per month. It is not disputed her income at present is over \$11,000 a month.

Mr. Garrison has degrees from Yale and Columbia, and previously worked at Oppenheimer & Co. in New York. His income dropped dramatically from 2001-2005 and he testified this was due to the dot com bubble burst. CP 855. The undisputed evidence showed that in 2007-2009, Mr. Garrison earned some \$21,000 while working with Stonebridge Securities. *See* Trial Exhibits 5 and 70; RP 9/17/09 at 57. This equates to less than \$1,000 a month.

² The couple has two children, aged 12 and 14, who are “delightful, bright, and very engaging,” and who despite the dissolution proceedings are “doing extremely well.” CP 857. The trial court found both parents are involved with the children and “very dedicated” to their children. CP 857. These findings are not in dispute. The trial court found Ms. Garrison should remain in the family home with the children. CP 857. This ruling and the parenting plan providing for joint decision making are not in dispute. Throughout the case, including at trial, Ms. Garrison had sought sole decision making and Mr. Garrison sought joint decision making.

³ She graduated from Wesleyan University; in 1988-1995 she worked in finance systems in New York City, rising to a position at Bloomberg Financial Markets where she was top producer for system sales with 240 accounts. Trial Exhibit 60. She did not work from 1995-2001, *id.* After the couple moved to the Seattle area in 2001, she founded Tahoma Capital Group LLC and from 2003 to the present she works at Andrew Davidson & Co. as director of marketing/business development for the USA, Japan and Asia. *Id.*

There was no evidence he makes any more than that at present.⁴

Both he and his employer Michael Hendrickson, testified as to Garrison's work-related activities from 2007 onward.

Hendrickson testimony. Hendrickson is owner of Stonebridge Securities, a boutique investment bank, *id.* RP 9/17/09 at 45-47. Stonebridge finds finance in New York, London, and Tokyo for corporate clients, and is paid only upon consummation of a deal. *Id.* at 51 lines 6-19. Stonebridge had not closed any deals since 2007. *Id.* at 56 line 12. It has no cash flow since Garrison started there in 2007, Hendrickson explained, (*id.* at 54 lines 9-16) because capital markets are as tight as they have ever been, *id.* at 52, lines 15-24; and TARP money had gone to banks who did not put it out for finance deals, *id.* at 52-53. Stonebridge is "looking all the time" for new business, *id.* at 53 line 21, its four contract employees (including Mr. Garrison) pursue new business "all the time," *id.* at 53, lines 10-25, but its predicament is the same as other firms. *Id.* at 54 lines 22-24. Hendrickson said he was keeping the business afloat, *id.* at 54 lines 9-16, because "down the track as business climate changes, I feel it's a good business to be in." *Id.* at 59 lines 12-15.

⁴ The court at CP 838-39 found Mr. Garrison's actual income is \$5,000 a month but meant to say this was imputed income. In fact, the trial court meant only to impute to him that level of income. The notation of actual income at CP 838 appears to be a scrivener's error; to the extent the trial court found he actually made \$5,000 a month, Mr. Garrison's challenges such a finding of fact as being wholly without substantial evidence.

Hendricks said Garrison's job was to prospect and find clients, *id.* at 57-58 line 7, and like the other registered consultants, only makes money upon success of a deal. *Id.* at 49-51. Hendrickson confirmed the numbers and facts shown in Exhibit 70 (also submitted by Ms. Garrison, Exhibit 5). RP 9/17/09 at 57. Hendrickson said Garrison was working full time and showed up every day, *id.* at 59-61, while also taking time to attend to the divorce. *Id.* at 62 lines 20-25. Hendrickson testified that since 2007 Garrison had brought in a number of clients and worked on a number of projects. *Id.* at 75 - 76 line 12. On cross, Ms. Garrison's counsel asked Hendrickson if Garrison's earnings compared well with others and Hendrickson testified, "it's equal with the times". *Id.* at 79. Hendrickson said Mr. Garrison's compensation was probably *more than* that of others at Stonebridge in this period. *Id.* at 79 line 24 to 80 line 2. Hendrickson described three deals Garrison had worked on, including one involved "millions and millions" at stake, another one where they visited Lehman Brothers in New York, a week before that firm's bankruptcy, and a local real estate project. *Id.* at 80-84. At this point the trial court cut off the project by project questions, saying Hendrickson already testified to the market conditions. *Id.* at 85-87.

Hendrickson concluded this line of questioning saying Garrison had been involved in "all" the projects Stonebridge has had, and "I need

him in those projectsthe bottom line is he's been involved in all of that including the contacts [and] the projects that we've been doing." Id. at 87-88.

Garrison testimony. Mr. Garrison testified his income is only \$1000 a month, RP 9/21/09 at 76 line 7. Mr. Garrison explained testified his finances became "precarious" since the 9/11 events in 2001, and the dot com bust. RP 9/21/09 at 74 lines 21-22. He said he had worked on commission with Oppenheimer for 20 years in New York, until things changed so dramatically, id. at 74-75 and pointed out that the current climate is was one that "revisited 1929." Id. at 75 line 8.

Mr. Garrison requested maintenance, to help him "reestablish my career" because his monthly expenses are about \$3000 a month. Id. at 76 lines 7-11. He contradicted imputing income to him of \$5000 a month. Id. at line 6. He asked for maintenance at \$4000 a month for five years noting his earnings are "negligible" and prospects near term are dim, id. at lines 14-20. He noted the disparity in earnings power and living circumstances is enormous. Id. at 19-25. He said "I'm on the verge of being homeless." Id. at 77 line3. He testified that the children should not "see my wife enjoying great luxury while I am viewed as indigent." Id. at 77 lines 1-6.

Trial court rulings. On September 22, 2009 (RP 9/22/09) the trial court ruled Ms. Garrison should be the primary parent (RP 9/22/09 at 3 line16) and adopted the temporary plan as the final parenting plan. Id. at 5 line 1. The trial court noted she had given up on her request for a 60/40 split and ruled the property division would be 50-50. Id. at 5. The trial court noted Mr. Garrison worked 60 hours a week, id. at 6, but found “he has been consumed by this litigation to the point where he has not been producing and it’s the Court’s fervent hope that as soon as this litigation is over, he takes those talents that he has back to the job that he has.” Id. at 6, lines 9-15. The court found both parents had the same potential for earnings, id. at lines 20-22 and she would set the father’s income at \$5,000 a month, the rate “he has indicated” and referred to the new worksheets. Id. at 7. The trial court stated that the original child support worksheets showed “both parents earning over \$11,000 a month.” Id. at 7 line 9. (This was not true, see Trial Exhibit 68 (Mr. Garrison’s January 2009 declaration saying he anticipated making \$5,000 a month).)

As to the value of the home, the trial court stated it looked “to the statutory . . . prohibitions against a real estate broker sitting on the stand and making any legal – taking any legal position in terms of the value.” RP 9/22/09 at 7 lines 20-25. The trial court said it was “left with” \$700,000.” RP 9/22/09 at 8 line 7 to 9 to line 2. The trial court denied

maintenance based on the view that as soon as Mr. Garrison “returns to the work force...I’m sure his income will again be on the rise.” Id. at 8 line 10-12. The trial court then ruled he had to pay half Ms. Garrison’s attorneys fees because “This is a long and lengthy litigation that didn’t need to be.” Id. at lines 15-17. The trial court ordered joint decision making while retaining the case six months to see if that would work out. Id. at 9 lines 4-17.

The findings and conclusions and decree were entered October 23, 2009. See CP 830-852 et seq. The findings and conclusions ordered the 50-50 split. CP 853, 858. The trial court found the home at 1030 NW 179th Place in Shoreline, WA was worth \$700,000 and had a first mortgage of \$458,721, CP 853, and a second lien for a home equity line of credit of \$77,146. CP 856. (The findings as to those debts are not challenged.) Based on that \$700,000 valuation Ms. Garrison was to pay Mr. Garrison \$54,906 within 90 days (CP 861, 863) with the mechanism being a refinance of the house to allow Ms. Garrison to draw cash out of it. CP 861, 863. Maintenance was denied based on the finding that reasons for Mr. Garrison not earning more are “not clear” and the trial court’s “hope that after this litigation is over” he “will focus his talents and energies back on his employment.” CP 855. The court found Mr. Garrison had been intransigent in litigation, prolonging the litigation

causing the case to be more costly, and ordered him to pay half of her reasonable \$49,075 in fees or \$24,537. CP 861 and 855-856.

On November 9, 2009, Mr. Garrison timely appealed the decree, findings and conclusions. CP 869-900.

V. SUMMARY OF ARGUMENT

Mr. Garrison merely litigated a case fought hard by both sides. He won motions and lost some. So did his wife. There was no misconduct rising to the level of intransigence in litigation as is required in the case law for a trial court to award fees regardless of ability to pay them, or need. There was no fee declaration showing the \$49,075 and no attempt to link any alleged misconduct to the fees awarded. As a result, there was no basis for the fee award. The fee award was thus an abuse of discretion and must be reversed.

There was no basis for the trial court's "fervent hope" that Mr. Garrison could choose to earn a lot of income after conclusion of this case. And hope is not a basis for a decision. All evidence showed finance sector problems affecting Hendrickson, Stonebridge, and *everyone* in the sector; and that any depression in Garrison's earnings is not caused by the fact he took time to do the dissolution case. Any good father would. There was no basis for imputing income to him or finding voluntary unemployment. The income disparity is so great, maintenance should be awarded.

The trial court egregiously mishandled the valuation of the marital home. First, it wildly misconstrued RCW 18.140.020 to bar Mr. Garrison's evidence; the disclosure requirement for real estate licensee to testify as to value was plainly met as the licensee propounded by Mr. Garrison read the disclosure statement in open court. Second, the admission or reliance on the \$700,000 valuation propounded by Ms. Garrison was error. That valuation was based on stacking the deck with low comparables because her appraiser arbitrarily excluded all properties over \$850,000 (the value he himself had earlier set). He had a prior \$850,000 valuation and no basis for lowering it by \$150,000. He also excluded key comparables where the prime aspect of value was the protected 280 degree Sound and mountain views, by including as "comparables" properties without protected views, properties from 1.5 miles away and properties four miles away. This is the rare case where the evidence offered either was not admissible as an opinion because the foundation was lacking or there were so many defects no reasonable finder of fact could have relied on an appraisal at \$700,000 given the record.

The pattern of arbitrary and erroneous rulings in this case including branding Mr. Garrison as shirking work, intransigent and the like, shows this decision was based on an impermissible finding of marital fault. Because of that, the entire outcome must be vacated.

This court should eliminate the fee award, grant maintenance as sought and find the home was worth \$987,5000 (or at least \$850,000) and order adjustment in the cash payment as is proper. If there is a remand it should be heard by a different judge given the impermissible finding of fault. Fees on appeal should be awarded to Mr. Garrison.

VI. ARGUMENT

A. Standard of Review

Errors of law are reviewed de novo. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn.App. 791, 799-800 (2003). Rulings on evidence, distribution of property and maintenance are reviewed for abuse of discretion, *Hizey v. Carpenter*, 119 Wn.2d 251 (1992), as are awards of attorneys fees, *Marriage of Mattson*, 95 Wn.App. 592, 606 (1999). The court exercises discretion in making the distribution of assets, *Marriage of Brewer*, 137 Wn.2d 756 (1999), and its decision is reviewable for abuse of discretion, *Marriage of Washburn*, 101 Wn.2d 168, 179 (1984). Abuse of discretion is present if the decision is manifestly unreasonable or based on untenable reasons or grounds. *Marriage of Thomas*, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991). A finding of fact will not be sustained if there was no substantial evidence supporting it or no reasonable person could have ruled the way the trial court ruled. *Tewell, Thorpe & Findlay, Inc. v. Continental Cas. Co.*, 64 Wn.App. 571 (1992).

**B. There Was No Evidence Showing Intransigence;
The Fee Award Was an Abuse of Discretion.**

RCW 26.09.140, the usual basis for attorneys fees in a dissolution case, requires a showing of need, and ability to pay. Fees may be awarded regardless of need or ability to pay only if one party is shown to have been “intransigent” causing additional fees. *Marriage of Crosetto*, 82 Wn.App. 545, 564, 918 P.2d 954 (1996); *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965). “Intransigence” is shown only where there is severe or egregious misconduct in litigation, such as fraud, defiance of court orders, false allegations of child abuse, or other bad faith or egregious misconduct. *See, e.g., Marriage of Burrill*, 113 Wn.App. 863, 873, 56 P.2d 993 (2002) (false allegations of child abuse); *Marriage of Foley*, 84 Wn.App. 846, 930 P.2d 929 (1997) (frivolous motions and refusal to appear); *Marriage of Morrow*, 53 Wn.App. 579 (1989) (complex financial doings required untangling in 13 days of trial).⁵ Unless this severe misconduct permeates the entire case, one must show how specific intransigence caused additional fees and the trial court must segregate the fees resulting from the intransigence. *Burrill*, 113 Wn. App. at 873.

⁵ See also, *Marriage of Wallace*, 111 Wn.App. 697, 702-703 (2002) (intransigence in withholding finance information in litigation; fraud; waste); *Crosetto*, 82 Wn.App. 545 (refusing cooperation with GAL, and making spurious allegations of abuse rejected by officials); *Fleckstein v. Fleckstein*, 59 Wn.2d 131, 133, 366 P.2d 688 (1961) (disobeying decree).

Here nothing remotely approaches the required showings. First, there was no showing of the kind of fraud, waste, lying, deceit, or defiance of court orders that constitutes “intransigence” in the case law. All that was mentioned was a motion that violated a scheduling order – a not unusual occurrence. Mr. Garrison’s prior litigation positions had never been found frivolous and many of them were successful, including two motions he made for continuances. Ms. Garrison lost on motions to continue, lost on sole decision making and she in effect lost on her request for a 60/40 split of assets. Much of the filings in this case relates to parenting evaluator and other things which are just normal litigation efforts. This was a hard-fought dissolution between two successful and bright people but there was no showing of intransigence as that term is defined in case law.

Second, there was no finding that the alleged intransigence permeated the case. Indeed, at no point in the case were any fees awarded, or was there any finding of frivolousness. No prolongation of trial was shown; the trial was four days, as estimated. See RP 9/15/09 at 5-6; see RP 9/21/09 at 94 (trial ended on the 21st). This is appropriate when parenting and assets of this magnitude are at stake. Nothing remotely approached the 13 days needed to unravel a husband’s complex doings, the 13 days showing intransigence in *Morrow*.

Third, there was not even a fee declaration to prove \$49,075. See CP 903-905 (no fee declaration). And there are no findings linking any specific alleged intransigence to the \$24,537 awarded.⁶

The award of fees regardless of ability to pay is an equitable sanction for serious misconduct. Mr. Garrison could not get access to the HELOC pre-trial to pay for his own lawyer: it is outrageous he has to pay for hers post-trial regardless of his inability to carry that burden and where there is no intransigence shown. The fee award has no substantial evidence and is an abuse of discretion and should be vacated.

C. There Was No Evidence of Imputable Income or Voluntary Unemployment; Denying Maintenance Was an Abuse of Discretion.

Maintenance is used to equalize the parties' economic conditions or standard of living for a time following a dissolution. *Marriage of Estes*, 84 Wn.App. 586 (1997); *Marriage of Terry*, 79 Wn.App. 866 (1995). The purpose is to support the spouse receiving maintenance until he or she is able to earn her own living or otherwise becomes self-supporting.

Marriage of Lucky, 73 Wn.App. 201 (1994). The primary concern is the parties' post-dissolution economic positions, and the trial court should

⁶ There is one fee declaration in the record filed July 28, 2009 showing \$1,800 in fees for the 7-8 hours needed to respond to one single motion. CP 668-669. But there was no showing that this one single motion could amount to the level of intransigence required in the case law, or how a court could find \$49,375 based on proof of only \$1,800.

enter findings of fact or at least there should be a showing of substantial evidence on each factor. *Marriage of Horner*, 151 Wn.2d 884, 895-896, 93 P.3d 124 (2004). RCW 26.09.090 makes it clear the decision on maintenance is “without regard to misconduct.” *Id.* The relevant factors include resources and financial ability, time to acquire *suitable* or *appropriate* employment considering the skill level, interest, lifestyle and other circumstances, *prior standard of living*, duration of the marriage, and the condition and obligations of the parties and the circumstances. RCW 26.09.090.

Mr. Garrisons’ testimony was clear and undisputed by Ms. Garrison that he did not make more than \$1,000 a month. There is no evidence anywhere in this record that his actual income was any more than that. The disparity in income and lifestyle being so great, it was an abuse of discretion to not order maintenance.

The trial court’s findings and rulings on maintenance are illogical and wildly egregious. The trial court stated it based its decision on a “hope” Mr. Garrison would return to the work force, as if it thought he had not been trying to work, when the evidence was clear he worked very hard. The trial court even cut him off when he tried to put into evidence the actual work he was doing at Stonebridge. The evidence was also clear this work has a long fruition period. The trial court inexplicably ruled on

September 22, 2009 that Mr. Garrison earlier in the case was making \$11,000 a month. RP 9/22/09 at 7 line 9. This is a wildly unsupported notion departing from all evidence in this case. The trial court referred to his financial declaration to support the notion it should impute \$5,000 a month to him. However, what he said in his proposed child support order was that his actual income was \$1,000 a month and he wanted \$4,000 a month maintenance, adding up to \$5,000 a month. Trial Exhibit 99. It was irrational to impute income based on maintenance the court denied.

The findings as to voluntary unemployment were utterly unsupported. The notion he could “choose” to make money if only the litigation was over is contradicted by all the testimony from him and Michael Hendrickson that the depression in earnings came from deals not closing, which came from the nation’s credit market woes that affected Hendrickson, and others, and Garrison, alike. There was no evidence that Mr. Garrison by “trying harder” could solve the nations’ credit problems and bring Stonebridge back to a positive cash flow. That finding had no support in the record at all. And the finding of fact income should be imputed to him at \$5,000 a month also had no support at all.

The trial court even cited his long work history, which only showed he works hard. CP at 858.

The record shows that Mr. Garrison's depressed earnings from 2007 to present are independent of the dissolution case; they preceded it, and they were caused by conditions in general. Mr. Garrison cannot "choose" to have Lehman Brothers not go bankrupt or to change general conditions in the US economy. There was no suggestion Mr. Garrison should start a new career. All the evidence was that the present job he has is what he has 20+ years experience in and he should stay in it. It would be waste to make him retool into a permanently lower career path. The maintenance statute requires that lifestyle and his abilities be considered. The children's interest is for him to stick in finance and await the turnaround, to be a high earner again.

Moreover, "voluntary unemployment" is a phrase from the child support statute, RCW 26.19.071(6). After a child support decree is entered, a voluntary choice to earn less money cannot lead to lowered child support as this is an indirect attack on a court order (*Mattson*, 95 Wn.App. 592, 976 P.2d 157 (1999)) and the best interests of the child outweigh freedom to change careers *after the order is entered*. *Id.* at 163-164; *see also Lambert v. Lambert*, 66 Wn.2d 503, 508-510 (1965).⁷

Here, in contrast, all the evidence showed the decrease in earnings started before the decree. Following a career path involved lowered

⁷ *See also Fox v. Fox*, 87 Wn.App. 782, 784 (1997); *Marriage of Curran*, 26 Wn.App. 108, 110 (1980); *Carstens v. Carstens*, 10 Wn.App. 964, 968 (1974).

earnings for a time thus cannot be called “voluntary unemployment” when the voluntary choice is prior to the decree.

The trial court decree leaves him in precarious economic straits. He cannot “choose” to increase his income, he can not “choose” to bring back Lehman Brothers or solve our nation’s economic woes. The disparity in lifestyle is tremendous. To allow him to enhance his income in the future – which is in the best interest of the children – he should receive maintenance. It was an abuse of discretion to deny maintenance where the basis of voluntary unemployment lacked any evidentiary support. This Court should modify the decree to provide \$4,000 a month in maintenance.⁸

D. The Trial Court Abused Its Discretion as to Evidence of the Marital Home and the Finding it was Only Worth \$700,000 Lacks Substantial Evidence.

As with fees and maintenance, the rulings on the home value are egregiously illogical and erroneous. For starters, the trial court stated it was “left with” the \$700,000 valuation – as if the trial court was unaware of Ms. Garrison’s appraiser’s \$850,000 valuation.

⁸ There should be provision for reporting quarterly income, so that once his income comes back, the maintenance order may be modified. Should Ms. Garrison claim that she cannot afford maintenance, this only underscores the fact that the home is too expensive to keep when there is only one high income to support it. The solution is for her to sell the marital home. This is a Solomonic resolution in which Mr. and Ms. Garrison’s interests would be united in achieving a high price sale, and this is discussed below.

1. Excluding the \$987,900 Value Was Legal Error

Mr. Garrison's evidence of a \$987,500 value was through a report and testimony of real estate broker David Watkins who is not a certified real estate appraiser.^{9 10} The trial court excluded Watkins opinion and testimony as to value, saying only an appraiser could give evidence of value in a legal proceeding, and citing RCW 18.140.020.

This was an egregious legal error. A real estate agent may provide evidence of value in a court case. *Ramsey v. Mading*, 36 Wn.2d 303, 310-311, 217 P.2d 1041 (1950); see RCW 18.140.020 (2), (4) and (6), indicating a real estate licensee may provide a price opinion in evidence in a legal proceeding.

⁹ See Trial Exhibit 88 (\$987,900 value based on average square foot price of \$267 times 3700 square feet); see RP 9/17/09 at 192 lines 5-6 (value is some \$980,000) and 194 lines 25 (admitting report).

¹⁰ Watkins testified that he had 29 years estate experience, has been broker since 1991, is an expert in the field of real estate, his experience is in the Innis Arden and Richmond Beach communities in Shoreline. RP 9/17/09 at 154, RP 9/17/09 at 157 lines 1-5. Watkins' expertise included doing about 100 competitive market reports a year. RP 9/17/09 at 179 line 6. He testified that his reports are a good indication of the ultimate sales price, *id.* at 179 and his opinions as to value generally have 94% accuracy. *Id.* at 180 line 4. Watkins said the value of the Garrison home he arrived at is from taking its 3700 square feet, *id.* at 184, line 22, and multiplying this times the average per square foot value he saw (with adjustments from his comparables). *Id.* at 184 to 185 line 5. His conclusion was because of superior finishes its value was between \$946,800 to \$1,025, 700. Trial Exhibit 88, first page. Mr. Garrison had disclosed that Watkins would be an expert as to value of the marital home.

RCW 18.140.020 (2), (4) and (6) clearly provide a real estate licensee may provide opinions of the value of real estate, including in court.

Subsection (6) states that a real estate licensee who has prepared a written price opinion or who gives it “in evidence in any legal proceeding” must provide a statement -- “within the written document or **specifically and affirmatively in spoken testimony**” -- that the opinion is not an appraisal by an appraiser but is an opinion by a real estate licensee. RCW 18.140.020(6) (Emphasis added.) The subsection also provides that this disclosure need not be made if the opinion “is issued to a person who is not a prospective seller, buyer, lessor, or lessee as the only intended user.” *Id.*

Here, the record shows that David Watkins looked at RCW 18.140.020 (RP 9/21/09 at 28 lines 5-8) and stated he was a broker (RP 9/21/10 at 28 line 24 through 29 line 4; see also RP 9/21/09 at 154 -- and he read the entirety of subsection six of RCW 18.140.020 in open court, on the record, verbatim. RP 9/21/09 at 29 line 10 through page 30 line 7.

The statute says the disclosure can be spoken in court; here it was spoken in court; the statute was complied with; there is no fact dispute; as a matter of law there was no basis to exclude Watkins valuation and this alone requires reversal.

Moreover, there was no free-market buyer or seller here who received Watkins' report. This transaction was one under compulsion, as it was an equitable division of assets ordered by court, not a sale between a normal, voluntary buyer and a seller. The recipients of Watkins' opinion did not include any buyer, seller, lessor or lessee but only a court and parties in a case. Accordingly the exclusionary language in RCW 18.140.020(6) applies and no disclosure was even needed.

The findings of fact are clear that the trial court ruled this Watkins opinion inadmissible based on the "statutory prohibitions." This was error. The finding as to value must be vacated as a result.

2. Admitting the \$700,000 Value Was Abuse of Discretion.

Ms. Garrison provided an appraisal saying the marital home was worth \$850,000 in December 2008. See Trial Exhibit 29 ("it is my opinion the market value of the fee simple interest in the subject property, as of December 5, 2008, is EIGHT HUNDRED FIFTY THOUSAND DOLLARS [sic] (\$850,000.00).") See also, RP 9/16/09 at 18 line 21. The trial court statement that it was "left with" only the \$700,000 valuation totally ignores this other valuation provided by Ms. Garrison, and this error alone requires reversal as to value.

Moreover, the \$700,000 valuation opinion of Robert Chamberlin (Ms. Garrison's appraiser) in Exhibit 47 was admitted only through abuse

of discretion, and can not constitute substantial evidence. See RP 9/16/09 at 12. Chamberlin had to provide a reason to explain why he was lowering the value 20% in just eight months -- from his \$850,000 opinion down to \$700,000. But his reasons do not lay a foundation for the change in his opinion, so his new value at \$700,000 should not have been admitted.

There are many problems in Chamberlin's work which show his \$700,000 valuation lacked any proper foundation and cannot stand.

Pre-deciding the value. Chamberlin testified he got to \$700,000 value in August 2009 by pre-deciding on a screen for what sales in Shoreline to consider – and he only looked at sales in a range from \$600,000 to \$850,000. RP 9/16/10 at 10; Exhibit 47 at page 4. In contrast, the December 2009 valuation at \$850,000 had come after he used a screen of up to “a million one, a million two”, RP 9/16/09 at 61, lines 6-9. But he provided no foundation for his opinion the screen should be dropped nearly 30%! Chamberlin testified only that the Innis Arden area “could have” dropped 20 percent in eight months, RP 9/16/09 at 59 line 13, and when asked, “Could have, or did?” he responded that he “didn’t do a total on the analysis of the Innis Arden performance.” *Id.* lines 14-16. He also admitted he had not compared the properties he used in December to those he used in August. RP 9/16/09 at 60 lines 8-24.

Ms. Garrison did not dispute the testimony of David Watkins and the information in his report (Exhibit 88) that there were several comparable sales near the subject over the screen “ceiling” of \$850,000 set by Chamberlin. The Watkins report (Exhibit 88) includes NWMLS print outs showing several sales in Shoreline above \$850,000 -- including one (at 18075 17th NW) sold at \$880,000, one (at 20121 23d Ave NW) sold at \$1.065 million, and one (at 17291 15th Ave.) sold at \$1.105 million. There was no testimony by Chamberlin or any of Ms. Garrison’s witnesses challenging those facts. There was no argument these sales were not in fact made. **Thus, the undisputed evidence is that there were sales above Chamberlin’s arbitrary \$850,000 ceiling.** Had he used the same screen he used in December he would have found those sales. His August pre-decision to set a bar at \$850,000 shows his August work has no reasonable foundation.

Magnolia sales seven miles away. Over Mr. Garrison’s objection, Chamberlin testified at length about a study he did on sales in the Magnolia neighborhood in Seattle, after his August 2009 valuation, in an attempt to bolster the view there was a steep drop in values.

Chamberlin claimed he did a study just before trial of Magnolia sales.¹¹ Chamberlin testified he believed Magnolia was declining because he obtained a sales print out from NWMLS and found Magnolia had 23 sales of which 11 were below \$800,000; and that this was relevant to Shoreline. RP 9/16/09 at 61 lines 24-25 to page 62 lines 25. He testified that he found 23 pending or closed sales in Magnolia, RP 9/16/09 at 23, of which 11 were below \$800,000, and he found one at 3052 23d Ave W., which sold three times in 2009, *id.* at 23, with a steep drop. *Id.* at 24. Chamberlin concluded from this the Magnolia market had stabilized but at a lower point than six or seven months ago, *id.* at 24. He said Magnolia was a stronger market area than Shoreline,” *id.* at 25 and said he relied on the study of Magnolia to support his view that the marital home dropped steeply from December 2008 to August 2009. *Id.* at 25.

Chamberlin’s work about Magnolia was subsequent to his August 2009 work on the subject property. Thus, it could not have entered into his basis for that August valuation nor show why his lowering the screen was proper. Since the Magnolia study was not part of his valuation, it should not have been admitted.

¹¹ Mr. Garrison objected because he was not given this study. RP 9/16/09 at 21. Mr. Garrison complained he had no copy of this third study. RP 9/16/09 at 22. The Court overruled this objection and let Chamberlin testify. *Id.*

He also did not provide the Magnolia sales data or documentation on which he relied. Mr. Garrison was denied that data and documentation. This requires disallowing the Magnolia testimony and the plummeting-values theory it was used to support, and the resulting foundation for showing the \$850,000 no longer applied.

Real estate is all about location. Chamberlin agreed that in real estate location is key (RP 9/16/09 at 15 lines 1-11 (“location, location, location”). Chamberlin testified about a property in his August 2009 report, at 9335 22d Ave. NW Seattle. See Trial Exhibit 47 at page 8. He testified this was in the Olympic Manor neighborhood in Seattle, in Ballard, and this location was four miles from the Garrison home, RP 9/16/09 at 53. Magnolia is even more miles away from the Garrison marital home, so evidence as to Magnolia could not be considered to show market conditions in Shoreline.

Chamberlin testified he relied on four properties in Magnolia, RP 9/16/09 at 63 lines 1-3, including one at 3052 23d in Magnolia that is reached by going on the Dravus Bridge to Magnolia, then up the hill and the 3000 block is “a bit north of that Dravus Street.” RP 9/16/09 at lines 6-9. He testified the price dropped in two sales in six months from \$975,000 to \$780,000, RP 9/16/09 at 64, lines 4-6,.

Apparently this was offered to indicate a 20% drop was happening in the relevant market. However, apart from the fact 23d in Magnolia, in Seattle, is three blocks from Burlington Northern rail yards and cannot have western views to Puget Sound, it is simply too far away to relate to the Garrison marital home in Shoreline.

In sum, there is no substantial evidence relevant to the Garrison home to lay a foundation for a 20% drop in values that would justify Chamberlin changing the screen he used to appraise the Garrison home. There was no evidence in this record supporting the pre-decision to drop the screen for the subject by 30% and the \$700,000 valuation of the subject thus had no foundation and should have been excluded.

Apart from the pre-screening error, there were other admitted defects or facts concerning the \$700,000 valuation opinion.

Error as to daylight basement. Chamberlin first testified the marital home had no daylight basement but only a “basement basement” that was not a “daylight basement.” RP 9/16/09 at 25 lines 18-20. But on cross examination he reversed himself.¹² Watkins confirmed, without any contradiction, that the Garrison home basement is a daylight basement

¹² He agreed he did not know there were doors to the outside in the basement (RP 9/16/09 at 64 lines 18-25, regarding the sliding door, and RP 9/16/09 at 64-65 regarding another door). When pressed whether there were not doorways indicating this was a daylight basement that’s “above dirt,” he said, “It’s still a basement, it could be labeled as a daylight basement,” RP 9/16/09 at 65 lines 5-9.

with doors to the yard. RP 9/17/09 at 192 lines 14-23, 193 line 4 and 189 line 21. In other words, Chamberlin's August 2009 study was based on the false premise the subject had no daylight basement; this would skew his all his comparables. This kind of basic error destroys the notion of comparability that he testified to as the basis for his method, and as a result his \$700,000 appraisal cannot be admitted or considered..

Upgrades. Chamberlin admitted that his method did not consider whether or not the comparables had been upgraded. RP 9/16/09 at 46 lines 13-20. He agreed that the Garrison home had received some \$200,000 in upgrades. RP 9/16/09 at 67 line 307. Watkins confirmed the Garrison home had superior finishes, RP 9/17/09 at 189, the finishes were great *id.* at 189-191. Again, this is a basic mistake that invalidates the comparability method Chamberlin says he used, and disqualifies his work.

Elimination of comparable view properties; inclusion of dissimilar properties. The undisputed evidence in the Watkins testimony and report (Trial Exhibit 88) compared to the Chamberlin report (Trial Exhibit 47) shows that Chamberlin actually *ignored comparable sales in Innis Arden within a few blocks of the Garrison home* with the same kinds of protected, 180-degree, sweeping sound and mountain views of the Garrison home has. These homes were apparently excluded by the arbitrary decision to screen out homes over \$850,000.

There was no dispute that the Garrison marital home at 1030 NW 179th in Shoreline had as its key value component a prized location, that provided 180 degree, sweeping, Sound and mountain views typical of Innis Arden bluff properties and protected by the Innis Arden covenants that surrounded the Garrison home. See the pictures in Trial Exhibit 88 (showing sweeping view over a neighbor's roof top, including the Olympic range to the west, over Puget Sound). Watkins explained the sweeping, 180-degree views of the Sound and mountains were protected by covenants from ever being obstructed. RP 9/17/09 at 204 lines 23-24, 205 line 2. Chamberlin agreed the Garrison home had 180 degree views of the Sound and mountains. RP 9/16/09 at 66 lines 11-2 and 15-19.¹³

Watkins' testimony and report indicates, without contradiction, that only sales information in the Innis Arden community could be comparable, because this is the only neighborhood that is close and has similar protected views. He testified that only properties a quarter mile to

¹³ Chamberlin agreed that the Garrison home is right on the line with Innis Arden which surrounds it on three sides, RP 9/16/09 at 56, lines 1-2. Watkins testified that the Garrison home abuts Innis Arden, RP 9/17/10 at 158 lines 14-16, this particular block is exceptional, *id.* at 159 line 1-2. He testified that the neighborhood matters, *id.* at 161 line 1, lines 1-12, and the neighborhood is "key" and is "the base point" valuation, with this particular street having buyers waiting for properties to come on the market, *id.* at 161 lines 17-21. He explained that there is a difference between protected and unprotected views, *id.* at 169 lines 8-20. He testified this is a particularly desirable street, *id.* at 162 and he has knowledge of sales there, *id.* at 162-163; the Garrison lot is superior, with a view from the backyard, and is well terraced, *id.* at 166 lines 4-8.

the north, south or west (but not to the east) could be comparable. *Id.* at 207 lines 16-25.¹⁴

Watkins' first property (16778 16th) is discussed below.

Watkins' second property at 16767 16th Ave NW is an Innis Arden bluff location. See Trial Exhibit 88. Watkins testified (RP 9/17/09 at 210-211) this was a bluff site directly across the street from property one, also used by Chamberlin, was listed at \$955,000 and sold for \$940,000; this was comparable to the Garrison home, *id.* at 211, lines 7 and this property had not been updated in the basement, *id.* at 211 lines 8-10. There was no explanation by Chamberlin why he excluded this from his work. His arbitrary cut off at \$850,000 eliminated this property, showing how that cut off would predetermine his result.

Watkins' third property at 17110 12th AVE NW Shoreline in Innis Arden is about five blocks from the Garrison home, in Innis Arden with its

¹⁴ Watkins noted the Olympic Manor property was five miles away and not superior, *id.* at RP 9/21/09 at 15, the Watkins property on 10th NW lacked the upgrades of the Garrison home, and had "none whatsoever," *id.* at 16 lines 7-12, and the comparable on 15th NW had a view that could be blocked, *id.* at 17 line 14, and Chamberlin did not adjust upward for the Garrison home's view protection which is a feature of the home, the street and the streets around it in Innis Arden. *Id.* at 17 lines 18. He noted the Shoreline height limit of 35 feet means views can be blocked. and 15th is one of the busier streets in Shoreline. *Id.* at 17. He added the one on 21st place lacked the right quality and needed a lot of work, *id.* at 18, and "nobody in Richmond Beach has protection from their view being blocked. So all the comps can be blocked for the most part." *Id.* at 19 lines 1-14. He noted very few homes have 180 degree views, and the Garrison home has covenants like Innis Arden to protect the view. *Id.* at 21.

protected views, and sold at \$840,000. See Trial Exhibit 88. Watkins testified to this price, and noted this property has an upside down floor plan, *id.* at 211 lines 2-25 (called “innovative” in the NWMLS listing in Trial Exhibit 88). It has protected sound and mountain views. *Id.* Again, Chamberlin’s failure to consider this sale (the list price above \$850,000 presumably meant his cut off excluded this one) invalidates his method as it is based on an arbitrary cut off.

Watkins’ fourth property at 16704 16th Ave NW is about half a mile from the subject, in Innis Arden. (See NWMLS listing in Trial Exhibit 88). Watkins testified this property had comparable sound and mountain views, has 3970 SF, and he was inside this property and knows it had an obstructed view. He testified this had a pending sale at \$1.150 million although it needs updating. *Id.* at 212-214. Again, Chamberlin’s exclusion of this was arbitrary and shows his method is not a true appraisal.

Watkins’ fifth property at 18025 17th Ave NW is again very close to the Garrison home, is in the Innis Arden community, has sweeping Sound and mountain views from a bluff location, was built in 1955, and was sold at \$880,000. See Trial Exhibit 88. Watkins confirmed this property has sweeping views, and noted it was only in good condition, not

superior condition, on the inside. RP 9/17/10 at 215. Again, the Chamberlin cut off excluded this, showing his method was invalid.

The sixth Watkins property at 20121 23d Ave NW is in the Richmond Beach community, not in Innis Arden, see Trial Exhibit 88. The property had sound views and a sale price at \$1.065 million (Exhibit 88). Watkins testified this property can have its views blocked, RP 9/17/10 at 216 line 16-17, but he considered it because the Garrison view and interior finish were better. *Id.* at 217 line 2-7. Again, Chamberlin's cut off approach eliminated this property from consideration. Notably he did use a \$737,000 sale from a nearby address on 21st Place. (Trial Exhibit 47). This willingness to include a sale under \$850,000 while excluding one over \$1 million shows his method is so flawed his work is not an appraisal.

Watkins' seventh property at 17291 15th Ave is in Innis Arden, close to the subject. See Trial Exhibit 88. This sold at \$1.105 million. Again, Chamberlin's arbitrary cut-off kept this out of his work.

Effect on valuation. In sum, the Watkins report shows six properties (Watkins' two, three, four, five, six and seven) that support a higher value than Chamberlin reached – and show Chamberlin's \$850,000 cut-off was arbitrary and made his opinion not a real appraisal.

Chamberlin's arbitrary decision to lower his screen eliminated the most

comparable properties with protected views and locations very close to the Garrison home. Ms. Garrison did not even attempt to have Chamberlin explain this or address Watkins' comparables.

Notably, Chamberlin admitted on cross examination that there is a \$300,000.00 to \$400,000.00 premium for bluff properties. RP 9/16/09 at 56 line 23 to 57 line 6. This is an admission that Chamberlin's excluding the nearby protected view properties, lowered the result of his work by \$300,000 or more.

Chamberlin's comparables range far from Innis Arden views, he went into Richmond Beach and its non-protected views, see RP 9/16/09 at 46 line 22,¹⁵ and even used a Seattle property.

It is exactly as if Chamberlin were asked to find the average of all cards in one player's hand in a bridge game, where, out of the 13 cards, Chamberlin threw out a King, a Queen, a Jack, two tens and two nines -- and then looked at the remaining sixes and sevens and said their average was only seven. He literally stacked the deck.

Chamberlin's comparables exhibit other problems for his conclusion. His property one at 19807 10th Ave. NW in Richmond Beach is not Innis Arden; it is about a mile away from the Garrison home, and

¹⁵ He agreed Shoreline extends from 145th as its city limit, RP 9/16/09 at 47 lines 4-7, and it went up to about 205th, id. at line 21, a span of some 50 blocks.

ten blocks in from the water, off the bluff. (The statements about location in this brief are all shown by the addresses of the properties; the trial court is familiar with the block numbering system in the area). The address is in fact ten blocks from the water while Garrison's home is closer to the sound. There is no evidence this has protected views. The address is not shown to be on a cul de sac. This property is not comparable in location, or views.

Chamberlin's property two at 16768 16th SW is close to Garrison's home. Chamberlin noted it listed at \$825,000 but gave it a 20% boost for its larger land area and used it to get to an indicated value of \$700,000 for the Garrison home. This is Watkins' property one, Trial Exhibit 88. Watkins testified this property was run down and a total remodel. RP 9/17/09 207 lines 1-9. This testimony was un-contradicted and it disqualifies this property.

Chamberlin's property three at 9335 22d NW is in Seattle – not Innis Arden, and not even Shoreline. Chamberlin testified that this parcel was “kind of adjacent to Ballard in northwest Seattle.” RP 9/16/09 at 53, lines 14-15. This was 80 blocks away from the subject property. RP 9/16/09 at 54 line 7-8. This property is not comparable as the decision to go 80 blocks away in a different city disqualifies the integrity of Chamberlin's work.

Chamberlin's property four at 19827 15th NW is a mile away from the Garrison home, is not in Innis Arden, there was no evidence of a protected view, and at 3050 SF it is smaller than the Garrison home. It is in Richmond beach with no CCRs. Trial Exhibit 47. While Chamberlin called this equal, the photograph shows it is a totally different, modern house, with no comparable sweeping 180 degree views. It is dissimilar and not in a comparable location and lacks comparable protected views.

Chamberlin's property five at 17110 12th Ave NW is in Innis Arden and sold at \$840,000. This property according to Chamberlin indicates the Garrison home should be valued at \$697,000. This is perhaps the only property Chamberlin used, that is comparable. That there is only one out of six that could be comparable, shows his work is invalid.

Chamberlin's property six at 20207 21st Place NW is about 1.5 miles away from the Garrison home, in Richmond Beach, well north of Richmond Beach Park, without protected views, and was built in 1982, in a different style. This is a couple of blocks from one of Watkins' properties (Watkins six). As noted above, there was no explanation provided as to why Chamberlin would pick this one, selling at a lower price, while excluding Watkins six, which sold at over \$1 million.

Uncontestable evidence of falling inventory. Watkins testified sales were improving in the Innis Arden area and inventory had been

declining and was down to four or five months' inventory; an three months is a a buyer's market; so he called it a "healthy market." RP 9/17/10 at 209, lines 12-15. See also Trial Exhibit 88, sixth page, "Months of Inventory" Chart, showing "Months of Inventory Based on Closed Sales May 2008 to July 2009" had dropped in Shoreline from 25 months of inventory in May 2008 to 3.3 months of inventory in July 2009; RP 9/17/09 at 175 lines 22-25.

This was objective and uncontestable data undermining the Chamberlin hypothesis of a plummeting market. Chamberlin merely said sales in Shoreline could have been falling, but that is not a proper basis for him to adjust downward his screen.

The undisputed evidence is that the Chamberlin work has crucial flaws – excluding relevant properties close to the subject, using an arbitrary \$850,000 cut off, and ranging out to Richmond Beach, away from protected views, then down and across the city border to Olympic Manor in Seattle, and then miles more down across the Ship Canal to Magnolia, all to try to get out from under the \$850,000 valuation Chamberlin provided. Under the undisputed facts shown, the \$700,000 report and opinion should not have been admitted or at a minimum it cannot constitute substantial evidence and no reasonable finder of fact could have relied on it.

D. The Trial Court Abused Discretion in Excluding Mr. Garrison's Other Evidence

The trial court in effect allowed Ms. Garrison to have three studies – one at \$850,000, one at \$700,000 and one about Magnolia. But it did not let Mr. Garrison use his valuation at \$987,900. Moreover, when he tried to have other real estate licensees testify to rebut Chamberlin (including Jolene Andersen and Phil friend), the trial court disallowed this. The court noted Watkins had been on the stand, and “That’s all we’re going to have. RP 9/21/09 at 3, line 17. The court again criticized Garrison for offering evidence from three witnesses. *id.* at 3 lines 23-25, saying he had to pick one, *id.* at 3-4. Garrison offered this witness “as a rebuttal to comments that Mr. Chamberlin made...relative to ...the marketplace particularly in regard to what was going on in Magnolia and how that may be indicative or not of the over all real estate market.,” noting it would be a short presentation and the trial judge disallowed this testimony. *Id.* at 4 lines 11-21. The trial court also said “she’s not an appraiser,” *id.* at 5 line 15 and “What we needed here was an appraiser.” *Id.* at line 18. The court found the witness is cumulative and did not allow her to testify. *Id.* at 6 line 4-5. See also RP 9/15/09 at 8-13.

All these rulings were an abuse of discretion. Ms. Garrison was allowed to have Chamberlin range far and wide, but Mr. Garrison was not

allowed to rebut. Moreover, as noted, the fact the proposed witness was a real estate licensee does not matter. Finally, the notion that any additional witness is cumulative is bizarre; often one presents two or three witnesses to say “the stoplight was red, not green.” Where Ms. Garrison’s evidence included multiple appraisals and market analysis, Mr. Garrison should have been allowed to have multiple means of rebuttal.

E. The \$700,000 Valuation is Inconsistent With the Result

The trial court allowed 90 days for Ms. Garrison to pay Mr. Garrison recognizing this cash was going to have to come from her post-trial refinance of the marital home. E.g., CP 863 (final decree).¹⁶ The findings and decree provided that because the wife was keeping the marital home, she would be liable for the Bank of America mortgage in the amount of \$458,721, and the Chase HELOC in the amount of \$77,146. CP 864. Thus, the debt on the home -- prior to the refinance -- was \$535,867. Because the refinance was needed to pay Mr. Garrison the \$54,906, too, the total debt on the home *after* the refinance had to be \$590,773. Indeed, it is likely that the fees owing to Ms. Garrison’s

¹⁶ The decree ordered in ¶ 3.3(1) that “Husband shall execute a quitclaim deed and all documents and papers necessary to allow the wife to refinance the house.” *Id.*

counsel would have to be paid too, in the amount of some \$49,000, pushing the total refinance amount up to about \$639,000.

But if the finding of fact the home was worth \$700,000 was correct, then the home value could not support the refinance the court ordered. A \$700,000 would only support a debt of \$525,000 (using 75 % loan to value) or at most \$560,000 (using 80% loan to value). It could not support a debt load of \$590,773, much less \$639,000.

Indeed, at a 75% loan to value ratio the \$639,000 needed would require a home value of \$852,000. Thus, the trial court's plan to dissolve this marriage was actually premised on a value far higher than \$700,000 and order contemplating a refinance is inconsistent with that valuation.

Moreover, to get this refinance to fulfill the decree, Ms. Garrison would have to get a new appraisal that would entirely undercut Chamberlin's \$700,000 value – and his theory of a rapidly plummeting market. She could only carry out the decree if the real value was \$852,000. The trial court findings and decree thus contain inconsistent findings as to value or contemplate a bizarre yo-yo variation in value in which the home was \$850,000 in December 2008; yet plunged to \$700,000 exactly at the moment of trial – then rose rapidly back up to \$852,00 within a month or two after the decree so the refinance could take place.

The refinance provision requires a value of \$852,000 -- and this cannot be reconciled with the finding of fact the home is worth \$700,000.

For this reason, too, it was error to admit the Chamberlin appraisal, and no reasonable finder of fact could have relied on it.

Moreover, if the dissolution plan required a refinance which requires an independent appraisal, it was an abuse of discretion for the trial court to not await that evidence and make a finding of fact on value that is inconsistent with the value needed for the refinance.

Clearly, such independent appraisal would be relevant evidence of the home value. There would be no reason to not wait to set the value until it was obtained. And should this Court remand for a hearing on home value, it is likely that such independent appraisal would be used.

F. Sale of the Home

The home perhaps cannot be retained if Ms. Garrison pays Mr. Garrison maintenance and his proper share of equity in the home based on a proper valuation. A couple that used to have two high incomes, that now has just one, may not reasonably expect to keep a Sound view home next to Innis Arden. And, there are two homes that must be paid for now. There is no harm to the children if they move to a more modest home in the Shoreline area. They do not need protected, Sound views. They would benefit if the housing situations of the two former spouses were equalized.

Mr. Garrison told the trial court he was amenable to taking half the upside if the home is sold. Given the disputes on value, and given that the home likely has to be sold the Court could remand with a direction to the trial court to order sale of the home and then adjust its findings and decree to adopt the value obtained and credit Mr. Garrison with half the upside over \$700,000. The interests of the parents should be united in seeking a high value in a sale.

G. Impermissible Finding of Marital Fault

Where a dissolution cases is permeated with legal errors, abuse of discretion and unsubstantiated fact findings, or there is an inequitable outcome, the court on review may modify the decree to ensure a just equitable result. *See, e.g., DeRuwe v. DeRuwe*, 72 Wn.2d 404, 409 (1969). There the Washington State Supreme Court reviewed the entire case and affirmed increasing one spouse's share by \$100,000 where the trial court left had that spouse with "too little" share and the other spouse with "too great a share." *See also, Pollock v. Pollock*, 7 Wn.App. 394 (1972) (citing *DeRuwe*; increasing one spouse's share substantially).

Moreover, the court on review must review the result and the rulings leading to it to see if the trial court has ruled based on an impermissible or de facto finding of marital fault. *Marriage of Muhammad*, 152 Wn.2d 795, 108 P.3d 779 (2005). Marital fault is of

course no longer a proper consideration. *See* RCW 26.09.080. In *Muhammad*, the Washington State Supreme Court There, reversed a property division favoring a husband after reviewing the case closely where it found the trial court's decision was based on, in effect, "marital fault" of the wife in seeking a temporary domestic violence protection order which had caused the husband to lose his job. The trial court had stated the wife had to be aware of the "consequences" of seeking the protection order (i.e., the husband would lose the right to carry a gun, causing him to lose his job).

Here the trial court repeatedly looked with extreme disfavor on Mr. Garrison. It called his litigation efforts intransigence. It said he prolonged the trial when in fact the trial was only as long as the trial court estimated. It ruled he should get no maintenance, in effect calling him a shirker. It adopted a home value based on testimony about sales in Magnolia and exclusion of the most relevant, protected view properties. Its dissolution plan required a high value for a refinance that Mr. Garrison was denied the benefit of in the finding on value. It excluded his evidence of value when his real estate licensee had read the disclosure statement. It admitted Chamberlin's report when he used an arbitrary \$850,000 cut off.

Throughout the case the trial court warned Mr. Garrison of the "consequences" of his acting pro se.

But all he did was fight for parental rights, gain a 50-50 division, gain legitimate continuances, and litigate to protect his legitimate economic rights. Like the appellant in *Muhammad*, he should not have been warned when here merely pursued his rights, as this is in effect a finding of marital fault. The trial court's decision is based on marital fault, it punishes him for pursuing his rights and it cannot stand.

H. Mr. Garrison Is Entitled to Attorneys Fee on Appeal.

Mr. Garrison requests attorneys fees on appeal pursuant to RAP 18.1 and RCW 26.09.140 (appellate court may order fees on appeal). In this the appellate court looks to the financial resources of both parties, *Marriage of Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990) and merits in the appeal. *Marriage of Griffin*, 114 Wn.2d at 779, 791 P.2d 519 (1990). If the appeal issues are not frivolous and the economic circumstances are similar an appellant should not be forced to pay the respondent's attorneys fees. *Id.*

Here, Mr. Garrison's appeal issues are worthy; Ms. Garrison can afford to pay his attorneys fees and he cannot. Accordingly, the Court should order his fees to be paid for this appeal. At a minimum due to his lack of resources there should be no award of fees going the other way.

VII. CONCLUSION

For the foregoing reasons, the findings and decree should be modified so that (a) the award of fees is vacated and Mr. Garrison is credited for \$24,537; (b) findings as to imputed income and voluntary unemployment are vacated and the finding entered that Mr. Garrison makes \$1,000 a month; he should receive \$4,000 a month in maintenance for four years or until his income substantially changes and child support should be adjusted accordingly); (c) the marital home is valued at \$ 987,900 and Ms. Garrison should pay Mr. Garrison half of the difference between that value and \$700,000. Ms. Garrison should pay Mr. Garrison's fees on appeal. And given the egregious errors in marital fault finding that motivated the result, the case should be remanded to a different trial judge.

DATED: this 20 day of May, 2010.

Respectfully submitted,

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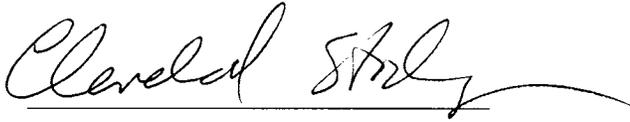
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CERTIFICATE OF SERVICE

I certify that on the 20th day of May 2010, I caused a true and correct copy of the foregoing Brief of Appellant to be hand delivered to the office of counsel for respondent at:

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