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No. 66138-8-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

In re Marriage of:
BARBARA CONGLETON,

Respondent,

v.

JAY CONGLETON,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

To the extent anyone ever “wins” a litigated dissolution, the appellant, Jay Congleton, has already won. The only issue below and on appeal is “just and equitable” distribution of property. This case was tried for four days, and the parties introduced hundreds of exhibits. The trial court’s findings and amended decree are lengthy and detailed. CP 493-517; CP 616-27. The trial court carefully considered all the evidence and arguments, and exercised its discretion to award Jay approximately 60% of the net marital assets. Respondent Barbara Congleton, although disappointed, is prepared to accept the outcome and move on. Jay, having received the lion’s share of the property, misapplies well-established law to argue that it is an abuse of discretion not to give him even more.

Barbara challenges only one issue on cross-appeal: the trial court’s inconsistent ruling that the parties, although ordered to file 2009 taxes separately, should split 2009 tax liability 50-50. Barbara also challenges a few other findings simply to preserve her arguments about valuation, but the small errors are harmless. With the one minor exception of 2009 taxes, Barbara urges this Court to affirm the property distribution in this case, which was well within the broad scope of the trial court’s discretion under RCW 26.09.080 and the case law of Washington.

II. CROSS APPEAL ASSIGNMENT OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erred in Finding of Fact #22, entered September 2, 2010, by finding “a present outstanding community tax obligation of approximately . . . \$25,000 for 2009.” CP 508.
2. The trial court erred in ¶ 3.17.7 of the Amended Decree, entered September 27, 2010: “Each party is ordered to pay 50% of the outstanding tax liability (personal and corporate) for . . . 2009.” CP 623.
3. The trial court erred in Finding of Fact #28, which conflicts with Finding of Fact #6, when it stated that “Respondent entered this marriage with approximately \$500,000 (this includes the PCL settlement) . . .” CP 512.
4. The trial court erred in Finding of Fact #16, by valuing the Vanguard 401(k) at “approximately \$105,000”. CP 503.

B. Issues Pertaining to Assignments of Error

1. In light of lack of substantial evidence to support the finding of an outstanding 2009 tax liability, and the order to file separately for 2009, should the decree be modified to delete reference to splitting 2009 tax liability 50-50?

2. Is there substantial evidence to support the trial court's finding: (a) as to the amount Respondent Jay Congleton brought into the marriage? and (b) as to the value of the Vanguard 401(k)?

III. STATEMENT OF THE CASE

A. Genesis of the Relationship

Jay Congleton and Barbara Nystrom met in the Spring of 2001, VRP 23/10-12, and were married July 13, 2003, eighteen months after they began continuously cohabiting. VRP 27/8-9; VRP 27/14-21; VRP 30/16-18; CP 497 (FF#2). They separated August 31, 2009. CP 497 (FF#2). Thus, the marriage lasted slightly longer than six years, and the duration of the committed relationship was approximately seven and one-half years.

At the time of entry of the Findings and Decree, Jay was 62 years old, and Barbara was 61 years old. CP 496 (FF#1). Jay is a construction consultant, and Barbara is a property manager. CP 496-97 (FF#1).

B. PCL Termination & Barbara's Support of Jay

Approximately two weeks after the parties were married, Jay was terminated from his 15-year employment with PCL construction management. CP 501 (FF#13). This, combined with the fact that Jay was paying \$2200 per month in maintenance to his first wife until about nine

months after his marriage to Barbara, meant that Barbara provided most of the support for the community from the time that Jay first moved in with Barbara in January, 2002, until when Jay received proceeds from the sale of the marital home from his first marriage (which was in March, 2004). VRP 27/8-9; VRP 27-28/22-25; VRP 481/1-5. Although Jay contributed to groceries, Barbara paid all the common bills and the rent (later, mortgage) during this time. VRP 28/1-25; VRP 610/2-6 & VRP 610-11/19-3. Barbara continued to pay the majority of the common bills through May 2005, although Jay deposited his unemployment benefits of \$430 per week. VRP 49-51/22-1.

In August, 2003, Jay brought a wrongful termination suit against PCL, which was financed by \$60,000 in community funds. VRP 51/23-24, 54/7-10; CP 502 (FF#13). The case was settled in August, 2007, in a net amount after attorneys fees of \$295,000. CP 502 (FF#13). The settlement proceeds were commingled in the community joint bank accounts. VRP 260/12-17.

Despite the fact that the lost wages or lost stock options resulting from the wrongful termination all would have been community earnings, the trial court characterized the settlement proceeds as Jay's separate property aside from the \$60,000 reimbursement of community fees. CP 502 (FF#13).

C. Property Brought into the Marriage

Jay opens his Statement of the Case with the inaccurate assertion that he came into the marriage “with approximately half a million dollars, whereas Barbara had only approximately \$15,000 in assets . . .” *Brief of Appellant* at 3. For this, he cites CP 512, an off-hand summary by the trial court of an amount that “includes the PCL settlement.” CP 512 (FF#28). On the face of Finding #13, which states that the PCL settlement did not occur until August, 2007, CP 502, and Finding #2, which states that the parties were married on July 13, 2003, more than four years *earlier* than the 2007 settlement, this off-hand statement is obviously not a supported finding regarding the property that Jay *brought into the marriage*.¹ *See also*, Ex. 108 (PCL settlement documents dated August, 2007).

Based on Findings #6 and #13, which are unchallenged by Jay, and are therefore verities on appeal, *In re Marriage of Fiorito*, 112 Wn. App. 657, 665, 50 P.3d 298 (Div. 1 2002), Jay came into the marriage with:

1) A good-paying job, which he promptly lost, thus saddling the community with the uncertainty and expense of a lawsuit that dragged on for four years, including summary judgment dismissal and a trip to the Ninth Circuit Court of Appeals, CP 498 (FF#6(f)); CP 501-02 (FF#13);

¹ A Finding that details what Jay brought into the marriage, Finding#6, CP 497-99, lists Jay’s employment with PCL as an asset he brought into the marriage, and references the subsequent PCL settlement, without finding that it was an asset brought in.

VRP 258-59/21-7; *Congleton v. PCL Construction Services, Inc.*, 2006 WL 3147442 (9th Cir.);

2) Jay's share of the as-yet unrealized proceeds from the sale of his marital home from the first marriage, which later proved to be approximately \$20,000, CP 497 (FF#6(a)), VRP 481/1-5;

3) His PCL 401(k), that the trial court found to be worth approximately \$30,000, CP 498 (FF#6(b)), but which was subject to a \$20,000 loan, CP 499 (FF#7(b)), thus leaving a net value of only \$10,000;

4) Two vehicles with a combined value of \$15,500, CP 498 (FF#6(c) & (d)), offset by a vehicle loan of \$15,000, CP 499 (FF#7(a)), for a net value of \$500; and

5) Personal property allocated in the findings a generous fair market value of \$32,000, CP 498-99 (FF#6(g)), all of which Barbara agreed to return and which the decree ordered returned to Jay, CP 546-47; CP 665 ¶3.4; 669 ¶3.17.10; CP 672.

Including his expectancy in his first marital home, the net value of this property brought into the marriage by Jay is **\$62,500** – a far cry from the nearly “half a million dollars” he claims in his opening brief. The PCL settlement cannot be added to this, not merely because it was not received until four years after the marriage, but also because all wages and stock opportunities lost, and all emotional distress suffered, was necessarily lost

or suffered at the time of and subsequent to the discharge, which occurred two weeks after the parties were married. CP 501 (FF#13).

D. Value and Characterization of Marital Assets and Liabilities

The principal marital assets at the date of separation (“DOS”) were: (1) the Odin Way home; (2) the so-called “Rental house” in Bothell; (3) the Maui time-share condominium; (4) the Vanguard 401(k) retirement account; (5) various vehicles; and (6) furnishings and personal property.² Against this, the parties had substantial mortgage, credit card, and IRS debt.

1. The Odin Way Home

This is the marital home, occupied by Barbara since she was restored to possession after being locked out by Jay on the DOS, August 31, 2009. CP 501 (FF#12); VRP 118/9-13; VRP 119/11-15. The parties purchased it in Barbara’s name prior to their marriage, in May, 2003, for \$338,000. CP 499 (FF#9). Based on an appraisal, the parties agreed at trial that its value on DOS was \$415,000. CP 501 (FF#12); VRP 132/9-11 (Barbara); VRP 437/5-8 (Jay).

Odin Way is subject to a mortgage solely in Barbara’s name of \$248,000. CP 500 (FF#11); CP 501 (FF#12). Barbara agrees with Jay

² Of obvious value to Jay is also his consulting business – Vanguard Consulting LLC. This was assigned \$0 value by the trial court, probably because Jay is sole active participant, and Barbara has no objection to it being assigned to Jay. CP 503 (FF#15).

that this leaves a **net value of \$167,000**, not the arithmetical error of \$152,000 contained in Finding #12 – but this small difference is harmless error and does not require remand for reasons stated in the argument below.

Although residually community property, the trial court found that Jay made the following contributions to Odin Way from his separate property: (1) \$30,000 down payment; (2) \$66,000 pay-off of second mortgage (home equity line of credit, hereafter “Odin HELC”); (3) improvements detailed in Finding #10 totaling \$32,000; and (4) \$23,500 worth of improvements. CP 500 (FF#10); CP 501 (FF#12). In a subsequent email exchange, the Court clarified that it considered the \$96,000 contribution represented by (1) and (2) above to be a gift to the community. CP 548.

2. The Bothell Rental House

This property was purchased and held as an asset of the Vanguard 401(k) during the marriage, in June 2009, for \$405,000. CP 504 (FF#17). The court found that the fair market value of the Rental House is \$440,000, and this finding is unchallenged and therefore binding on appeal. CP 505 (FF#19). The house is subject to a \$325,000 mortgage in Jay’s name, CP 504 (FF#17), and therefore it has a **net value of \$115,000**. Although encumbered by a lease to Barbara’s son, Paul testified at trial

that he would not want the lease if the house was awarded to Jay, and that he hoped Jay would not enforce the lease under those circumstances. VRP 391-92/23-5. The court's decree awards the Rental house to Jay free and clear, and voids the lease. CP 618, 624.

The court found that the Rental house "down-payment of \$80,000 came from the community's Vanguard 401K. In addition, the community paid \$10,000 in closing costs." CP 504 (FF#17). Jay also took \$20,000 from the community accounts and put it into the 401(k) to help make this possible. VRP 111/2-19. Notwithstanding these community contributions and the fact that it was purchased during the marriage, the court characterized the Rental house as Jay's separate property based on a quitclaim deed from Barbara to Jay. CP 504 (FF#17).

This characterization was unfair. There was no quitclaim. The property was purchased during the marriage in Jay's sole name based on Jay's ultimatum that if Barbara didn't sign immediately, her son and his family would have no place to live. VRP 106/11-25. Both parties testified that this was merely done as a convenience to aid in financing. VRP 112/1-12 (Barbara); VRP 329-30/8-11 (Jay). Nonetheless, Barbara does not object to this characterization or the distribution of this property to Jay, so long as the overall distribution made by the trial court is upheld.

3. The Maui Timeshare Condominium

In June, 2007 – during the marriage – the parties purchased in both their names a deluxe oceanfront timeshare condominium in Maui, Hawaii. VRP 47/2-5, 48/15-22, 278/2-3. The bank account transfer from the joint checking account in the amount of \$57,831.63 on June 5, 2007, corresponds to this purchase. VRP 48/15-22. This was a distress sale, so it may not have represented the full value of the property. VRP 542-43/24-6, 597-98/24-9. Barbara's evidence showed that the Maui timeshare was worth \$68,000, based on two offers for sale of comparable properties at \$80,000 and \$67,000, plus the purchase price and the distressed nature of the purchase. Ex. 221; VRP 597-98/24-9, 605/8-21. Jay's evidence was that the Maui timeshare was worth \$47,000, VRP 563/4-6, although it proved to be based on comparing sales of oceanfront condos that *were not "deluxe."* Deluxe condos like the one owned by the parties were rare – there were only 12 – and they were larger corner units. VRP 539/10-24, 541/1-7. The trial court failed to make a finding on the value of the Maui timeshare.

The parties agree that the Maui timeshare was purchased prior to the PCL settlement. VRP 47/6-7 (Barbara); VRP 267/1-16 (Jay). According to Jay, it was purchased with a \$47,000 loan from the community Vanguard 401(k), plus the rest (over \$10,000) from the

community checking account. VRP 278/10-17. After receipt of the PCL settlement, the loan was paid off out of those funds. VRP 273-74/25-1. Thus, the Maui timeshare is owned free and clear, with **a value between \$47,000 and \$68,000.**

4. The Vanguard 401(k) Retirement Account

In 2006, Barbara attended a seminar with an investment advisor, and based on that she recommended that Jay set up a self-directed retirement plan for his self-employed consulting business, Vanguard. This was established as the Vanguard 401(k), with Jay as sole trustee, although Barbara assumed it was for them both. VRP 65-66/12-6. When Jay used community income or other resources to fund retirement deposits, Barbara's income had to make up the slack in paying other community expenses. Also, Barbara had a \$15,000 401(k) of her own when she entered the marriage, CP 497 (FF#4(a)), but she cashed it in during the marriage, and deposited the proceeds (after tax withholding) into their joint accounts for community use. VRP 68/20-24, 69/7-13, 71-72/15-19. After that, the parties' only retirement account – a matter obviously of great importance to people in their early sixties – was the Vanguard 401(k) in Jay's name. VRP 293/5-8. The trial court found that the Vanguard 401(k) was community property, CP 504 (FF#17), and that finding is not

challenged and is therefore a verity on appeal. *Marriage of Fiorito, supra*, 112 Wn. App. at 665.

The following deposits were commingled into the Vanguard 401(k) during the marriage:

Amount / Description	Source
\$22,000	Jay's PCL 401(k)
\$ 6,900	Jay's SEP-IRA /QDRO
\$20,000	Jay's 1 st marital home
\$20,000	Community income – 2005
\$18,000	Odin HELC (community)
\$30,000	PCL Settlement
\$20,000	Community income – 2008
Total: \$136,900	

Source: Ex 172 & Jay's testimony, VRP 580-83/1-4

As sole trustee, Jay was the only one who could take withdrawals out of the Vanguard 401(k). VRP 520/6-8. The Vanguard 401(k) bought gold Kruggerands, for which it paid \$15,568.40, but which sold for \$24,000. VRP 311/9-14, 318/2-7. Aside from the \$80,000 loan to purchase the Rental house, already discussed, the gold was the only asset removed from the Vanguard 401(k) during the marriage, and it was removed after DOS because the trial court ordered it sold to help pay a community debt to the IRS.³ VRP 583/15-17.

³ The \$47,000 loan to purchase the Maui Timeshare was repaid out of the PCL Settlement, so it does not count as "removed" for our purposes.

Because the above is cost value, without accounting for accrual of income, the withdrawal of the gold must be valued at \$15,500. On this record, **the net value of the Vanguard 401(k) (after removal of the loan to purchase the Rental house) was at least \$41,400** after removal of the gold ($136,900 - 15,500 - 80,000 = \$41,400$).

The trial court valued this asset at \$105,000, including \$15,000 worth of gold. CP 503 (FF#16). This was Jay's initial testimony, but he corrected it and made it more accurate later, so this finding is based on the uncorrected testimony. *Compare* VRP 293-94/18-8, *with*, Ex. 172; VRP 580-83/1-4. As discussed below, this is harmless error, because Jay got both the value of the Vanguard 401(k), and the value of the Rental house purchased with 401(k) funds.

5. Motor Vehicles

At DOS, the parties owned or leased the following vehicles:

(1) A 2006 Lexus – Barbara brought a 1999 Toyota into the marriage and traded it in on a Lexus. VRP 183-84/21-9. According to Jay, at the DOS the Lexus was worth \$19,000, offset by a \$4,500 loan balance, VRP 443/2-16, for a **net value of \$14,500**.

(2) A 2007 Hyundai – This vehicle has no value over and above the outstanding loan. VRP 442/16-22. **Net value: \$0**.

(3) A 2009 Mercedes – This vehicle was leased by Jay in Jay’s name on or about DOS (August 31, 2009), without Barbara’s knowledge or consent. VRP 138/8-21, 199/5-13. Jay claims that it was a “birthday present” for Barbara, although Barbara’s birthday is not until October. VRP 549-50/19-9, 550/12-15. Barbara says it was obviously not for her, since she drives her grandchildren around and has no use for this red sports-car type Mercedes that is only a 2-seater. VRP 138/8-21. Jay traded in the community 2006 Suburban for the Mercedes lease, received \$7,500 for that, and put another \$2,000 down, for a total down payment on the lease of \$9,500. VRP 129-30/21-5. The lease payments are \$445 per month. VRP 361/1-3. Whether the vehicle will have value over the buyout at lease termination was not established. **Net value: unknown.**

6. Furnishings and Personal Property

There was a great deal of testimony back and forth about who had what furnishings and the like. This level of minutiae is a burden ably borne by the trial court. Suffice it to say that the trial court awarded Jay most of the personal property he requested. CP 498-99 (FF #6(g)); CP 511 (FF#27(1) & (2)); CP 515-17 (Ex. A to FF). In addition, the trial court accepted Jay’s version of disputed evidence that Barbara was responsible for items of his personal property allegedly missing from the common safe deposit box, and awarded him \$2,650, as part of the

judgment in his favor in the final decree, to compensate for this missing property (the other \$11,000 of the judgment was repayment of temporary maintenance). CP 509-10 (FF#25); CP 662 (Decree Monetary Judgment).

The court valued the personal property awarded to Barbara at approximately \$15,000. CP 512 (FF#28). At the same time, Jay was awarded tools that he valued at \$10,000. VRP 238-39/25-7. He was also awarded crystal decanters and glasses, the washer/dryer and refrigerator at the rental house, sculptures and framed art, sterling silver flatware, and other items of obvious value. CP 516-17, 627. Jay already had certain marital furnishings at his apartment, such as the parties' queen bed frame and one nightstand, and he had sold their queen mattress on Craig's List. VRP 214/4-17. Add in the monetary judgment for allegedly missing property, and the overall distribution of furnishings and miscellaneous personal property was approximately equal and certainly equitable.

7. Debt Accumulated During the Marriage

A major element of the distribution of assets and liabilities was the liabilities, since these parties carried a heavy debt load. In this area, Barbara was particularly hard hit by the final decree.

We have already detailed debt directly associated with assets – the mortgages and car loans. These were appropriately assigned to the person receiving the asset.

Prior to meeting Jay, Barbara did not use credit cards; she believed in paying in cash. VRP 26/16-21. But during the course of the marriage, both parties accumulated many credit card charges. Barbara was the only one with a Nordstrom card, but they both charged on it.⁴ VRP 101/2-10. On the Capital One card, Barbara charged personal items, but also community items, such as their joint trip to Paris, joint trips to Hawaii, wedding and other gifts to both of their children, and household bills. VRP 102-03/22-25. Regardless of what was available to pay other bills, Jay always insisted on using the community funds to pay off the full monthly balance on the cards that were in his name, in amounts ranging from \$1,500 to \$4,500. This often left insufficient funds to pay off the balances on Barbara's cards, and still pay the other household bills. VRP 104/1-3, 105/2-10; VRP 201/6-11. So Barbara ended up in a cycle of carrying credit card balances, which was exacerbated at the end of the marriage when, in both July and August, 2009, Jay took his monthly receipts back out of the joint accounts, which caused a number of bill pay checks to bounce. VRP 94-95/10-15; 99/20-25.

⁴ Although Jay accused Barbara of being a spendthrift, it must be noted that Jay was a big shopper too – he simply bought different things, such as nice suits, Tommy Bahama & Nast shirts, cameras, DVD players, guns, fishing and other sports equipment, exotic plants and Italian wines. VRP 149/5-17; VRP 227-28/15-20.

The trial court ordered that the Nordstrom debt be split 50-50 between the parties, which resulted in an obligation to each party of \$5,364.02, and that all other marital credit card debt be paid by Barbara. CP 538-39 (FF#23); CP 620-21. In addition, the court divided outstanding bills owed to a CPA, and to mediator Julie Dickens. The resulting division of debt made in the decree at CP 620-61 (aside from house and car debt discussed above, and IRS debt discussed below), **imposes nearly \$54,000 in debt on Barbara, and less than \$7,000 in debt on Jay:**

Creditor	Jay	Barbara	Cite
Nordstrom	5,364.02	5,364.02	CP 620-21
Hutchinson	422.50	422.50	VRP 137/7-12
Dickens	935.00	935.00	CP 620-21
BankAmerica	0.00	15,400	VRP435/16-23 (Jay)
Chase VISA	0.00	16,342	Ex. 205 p.6 ⁵
Capitol One	0.00	6,963.48	Ex. 205 p.6
Macy's	0.00	6,649.29	Ex. 205 p.6
Victoria's Secret	0.00	307.28	Ex. 205 p.6
Key Bank	0.00	1,486.26	Ex. 205 p.6
Total	6,721.52	53,869.83	
Percentage	11%	89%	

In addition to the above, at the DOS the parties had an outstanding tax debt to the IRS of \$37,100 for tax year 2008. VRP 316/7-9; CP 508

⁵ Barbara testified that she has not used her credit cards since DOS, VRP 204/14-16, and therefore the balances on Ex. 205 (her financial declaration given at the time of trial, cited by the court) represent DOS aside from payments and finance charges. The total balance due is about \$500 more if the DOS balances from Ex. 217 are used for Macy's, Capitol One and Chase, except that includes a health club balance not mentioned in the Decree, but nonetheless in Barbara's name and paid by her post-separation.

(FF#22). All of Barbara's taxes were paid via withholding from her paychecks. VRP 553/23-25. Because Jay was self-employed throughout all but the first two weeks of the marriage and his period of unemployment, his consulting company, Vanguard, was expected to pay quarterly estimated payments towards income tax. Barbara handled the accounts for Vanguard, for which she was not compensated. VRP 62/3-9. Barbara and Jay made mutual decisions and communicated regarding taxes. VRP 133-34/22-5; 134/9-11; 135/1-14. The documentary record is clear that Jay communicated directly with the accountants, and was also in the loop with copies of emails, regarding taxes. CP 1057-98. Jay's testimony demonstrated he was savvy and aware about taxes, including estimated payments during 2008. VRP 274/3-23. It was not uncommon for the parties to be late with, or even to skip, quarterly tax payments, figuring they could make it up later, or that their large annual contribution to the Vanguard 401(k) would offset the tax liability. VRP 111/2-9; 133/2-8; 134/9-11; VRP 602/16-20. For example, they were penalized on the 2007 taxes for late estimated tax payments. VRP 602/11-15.

The 2008 taxes came to a head just as the parties were separating in 2009. Barbara had made one of the quarterly tax payments for the year 2008, in the amount of \$14,300, paid in January 2009. VRP 134/12-17; VRP 617-18/25-8. The evidence was disputed as to whether or not Jay

was kept informed about the failure to pay the other quarterly payments. VRP 133-34/22-11. The trial court found against Barbara on this, and we do not challenge that finding on appeal.

The 2008 tax shortfall of \$37,100 has been reduced to a settlement agreement under which the parties are obligated to pay the IRS \$1,000 per month. Under trial court orders not challenged here, this is to be paid first from the proceeds of the gold Kruggerands held in trust by the Bugoni law firm, and then the remaining balance is shared equally by the parties. CP 508 (FF#22); 620 ¶3.6; VRP 316/10-15; VRP 317/1-4; 317-18/20-1.

The unpaid quarterly taxes in 2008 were on Vanguard income, not Barbara's income. VRP 553/23-25. Both Jay and Barbara signed the 2008 joint tax return on which underpayment was assessed, and therefore both are equally liable to the IRS. CP 508 (FF#22); VRP 298/1-11; VRP 527/18-23.

8. Summary of Distribution of Assets & Liabilities

Using net values, here is a quick summary of the property distribution made by the trial court in this case:

Item	Jay	Barbara
Odin Way		167,000
Bothell Rental	115,000	
Maui Timeshare	47-68,000	
Vanguard 401(k)	41,400 ⁶	
Autos	0 (2 vehicles – Mercedes?)	14,500
Furnishings/Personal	<u>15,000</u>	<u>15,000</u>
Total net assets	218,400-232,400	196,500
less general debt	(6,721.52)	(53,869.83)
less 2008 IRS debt	<u>(18,550)</u>	<u>(18,550)</u>
Net distribution	low \$186,178 (60%)	\$124,080 (40%)
	high \$207,128 (62.5%)	\$124,080 (37.5%)

No matter how you slice it, the trial court awarded Jay significantly more of the net value of the parties' marital assets – a 60-40 split in Jay's favor even if you accept his low-ball valuation of the Maui Timeshare.

IV. ARGUMENT

A. The Trial Court's Property Distribution was Not an Abuse of Discretion

1. The 60-40 Split Favoring Jay of the Overall Net Assets was Not Manifestly Unreasonable, and Should be Affirmed

The trial court has jurisdiction over, and is required to distribute, both community and separate property. *In re Marriage of Davison*, 112 Wn. App. 251, 258, 48 P.3d 358 (Div. 1 2002). To quote this Court's summary of relevant standards:

A trial court making a property division in a dissolution proceeding is charged with making a "just and equitable"

⁶ The other \$80,000 in value, based on the investment in the Bothell Rental house, is accounted for in the net equity in the Rental house, and to put it here also would be double counting.

distribution of property. RCW 26.09.080. To that end, the court is to consider the nature and extent of community and separate property, the duration of the marriage, and each spouse's economic circumstances. RCW 26.09.080. The parties' relative health, age, education, and employability may also be considered. "A paramount concern is the economic condition in which the decree will leave the parties." *In re Marriage of Dessauer*, 97 Wn.2d 831, 839, 650 P.2d 1099 (1982), *overruled on other grounds*, *In re Marriage of Smith*, 100 Wn.2d 319, 669 P.2d 448 (1983).

A property distribution need not be equal to be "just and equitable". *In re Marriage of Nicholson*, 17 Wn. App. 110, 117, 561 P.2d 1116 (1977). "The key to an equitable distribution of property is not mathematical preciseness, but fairness." *In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975). Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules. *Clark*, 13 Wn. App. at 810, 538 P.2d 145.

The trial court's considerable discretion in making a property division will not be disturbed on appeal absent a manifest abuse of that discretion. A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons. It is one that no reasonable person would have made.

In re Marriage of Tower, 55 Wn. App. 697, 780 P.2d 863 (Div. 1), *review denied*, 114 Wn.2d 1002 (1989) (some citations omitted).

Viewed through the lens of these well-established legal standards – which Jay himself quotes in his Opening Brief at pages 9-11 – Jay's challenge to the property distribution borders on frivolous. The overall distribution of net assets over liabilities favors Jay by at least 60-40. Jay was awarded 2 out of 3 pieces of marital real estate, 2 out of 3 marital

vehicles, *all* of the parties' only retirement account, and an equal share of their personalty. In addition, he was awarded sole ownership of his business. But still he wants more.

Jay seems determined to punish Barbara by leaving her without a home. Jay wants Odin Way, or at least a big chunk of its equity. To rule in Jay's favor in this appeal would so skewer the property distribution as to make it *unjust* and *inequitable*, and therefore to violate RCW 26.09.080. The trial judge was well within her "considerable discretion" to decide to award one of the pieces of real estate to Barbara. Even if this court might have acted done things a bit differently, the entire pattern of distribution here is well within the scope of reason and the evidence (aside from the 2009 tax allocation, discussed below), and therefore not an abuse of discretion.

Jay's brief is written as if the trial court were required to make its just and equitable division on an asset-by-asset basis. For example, he argues: "The trial court failed to divide the equity in the Odin Way house in a fair and equitable manner as required by RCW 26.09.080." *Brief of Appellant* at 12. But that is not an accurate statement of what RCW 26.09.080 requires. The statute requires a just and equitable distribution of *all the marital property*, not an equitable division of each asset. *See*, RCW 26.09.080 ("the property and the liabilities of the parties");

Friedlander v. Friedlander, 80 Wn.2d 293, 305, 494 P.2d 208 (1972) (“In an action for divorce *all* property, both community and separate, is before the court for distribution” (emphasis in original)). A just and equitable division of marital property must encompass a view of all assets and liabilities in order to be just and equitable. Jay’s asset-by-asset approach would improperly hamper trial judges in carrying out the command of the Legislature, and is at odds with the practice in this State.

It is improper to view Odin Way in isolation from the ample community contributions to the PCL settlement, the Vanguard 401(k), the Rental house, and the Maui Timeshare. Furthermore, even with respect to Odin Way, the community contributed through the community liability of the HELC that helped finance it, and through community income that paid its first mortgage.

Jay also suggests that returning the parties to their pre-marital condition should be a primary goal of the court. That is not the primary goal, *see, Friedlander v. Friedlander, supra*, 80 Wn.2d at 306 (“the economic condition in which the decree will leave them remains the paramount concern in making a division of the property”); at best, it might be one factor in a truly short-term marriage. *But see, Marriage of Fiorito*, 112 Wn. App. at 669 (argument rejected in case involving 3-year marriage). The usual effect of a finding of short-term marriage is not

returning the parties to their pre-marital condition, but making a relatively equal distribution of assets. 20 Wash. Prac. – Family Law - §32.11 at 178 (West 1997). So if this were truly a short-term marriage, that fact would call into question the 60-40 split made here.

The pre-marital state of the parties is of less relevance in a six-year marriage such as the Congleton's, which was preceded by one-and-one-half years of committed cohabitation. Even Jay admits that the standard classification of short-term marriage is five years or less. CP 1193-94 (citing Former King County Superior Court Judge Robert W. Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, Wash. St.B. News, 14, 16 (Jan. 1982)).

Marriage duration is largely a false issue in this case anyway, because the pre-marital condition of these parties was not nearly so different as Jay contends. The actual record demonstrates that Jay's allege half-million dollars brought into the marriage is pure fantasy. All he brought into the marriage was about \$62,500 in assets, a job that he promptly lost, and an obligation to pay his ex-wife substantial maintenance. The PCL settlement was uncertain, and the PCL litigation was a burden on the marital community to the tune of \$60,000 during the first four years of the marriage. When it was finally settled, the money was earned as much by Barbara, who took care of Jay during his period

of unemployment and whose earnings supported the household and the litigation in the early years, as by Jay.

After hearing four days of testimony and sifting through several hundred exhibits, the trial court exercised its discretion to award Jay about 60% of the net assets, and to divide the parties' real estate by giving Barbara the Odin Way house in which she was living free and clear, and giving Jay the Rental house and the Maui Timeshare free and clear. Although Barbara would have preferred a different outcome closer to a 50-50 split of assets and liabilities, she accepts the trial court's decision. Jay does not, but that doesn't change the fact that it is not manifestly unreasonable, and not exercised on untenable grounds or for untenable reasons. Nor is this a decision that no reasonable person could have made. In short, the trial court's property distribution is not an abuse of discretion, and it must be affirmed, with the small modification for 2009 taxes discussed in section B below.

2. Jay's Challenge to Finding #12 is Unfounded

With the exception of the arithmetical error referenced in our Statement of the Case (purchase price \$415,000 minus mortgage of \$248,000 = equity of \$167,000, not \$152,000 as stated by the trial court), there is nothing flawed about the trial court's arithmetic regarding Odin

Way. Furthermore, the only errors short *the community*, not Jay, and are harmless in light of the overall property distribution.

The trial court found that Jay made separate contributions to Odin Way in the total amount of \$151,500. CP 501 (FF#12). Jay complains that you cannot get the \$151,500 figure from any combination of numbers based on the trial court's findings. *Brief of Appellant* at 13. Jay is mistaken. This number comes from the trial court's finding of Jay's supposed \$30,000 down-payment, plus \$66,000 payoff of the HELC out of the PCL settlement, plus \$23,500 in property improvements detailed in Finding #12, plus \$32,000 in property improvements detailed in Finding #10. CP 500 (FF#10), CP 501 (FF#12) (30,000+66,000+23,500+32,000 = \$151,500). Subtracted from the correct equity, the trial court should have found \$15,500 in community equity, instead of \$10,500. But so what? Improper characterization of property prior to distribution is frequently deemed harmless error:

We need not remand the distribution issue to the trial court unless "(1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way."

In re Marriage of Shui, 132 Wn. App. 568, 586, 125 P.3d 180 (Div. 1 2005) (quoting, *In re Marriage of Shannon*, 55 Wn.App. 137, 142, 777

P.2d 8 (1989)). It is not clear that the trial court would have changed its distribution in this case had it correctly noted the greater community value in Odin Way. Indeed, that would only have cemented its decision to balance the many assets given to Jay with this one key asset given to Barbara.⁷

Jay complains about the lack of “reimbursement” to him for these separate contributions.⁸ *Brief of Appellant* at 13-14. But the court’s detailing of contributions only determines which parts of Odin Way are community, and which parts are separate. The trial court, having made that determination, was well within the law and its discretion to award portions of Jay’s separate property to Barbara, in order to create an overall just and equitable distribution. *Friedlander v. Friedlander, supra*, 80 Wn.2d at 305-06; *Marriage of Davison, supra*, 112 Wn. App. at 258-59 (husband’s complaint that he was awarded only 25% of the community property misses the point that the trial court is bound to make an equitable distribution – not an equal distribution – of all property, community and separate).

⁷ The trial court later explained that it considered \$96,000 of Jay’s contributions (the alleged down payment and the payoff of the HELC) to be gifts to the community. CP 548. That would mean that the community equity in this asset would be \$111,500 (15,500+96,000 = \$111,500), and Jay’s corresponding separate interest would only have been \$55,500 (151,500-96,000 = \$55,500).

⁸ Jay concedes that he is being reimbursed for the temporary maintenance he paid, via the monetary judgment. *Brief of Appellant* at 14; *see*, CP 617 (judgment); CP 621 ¶3.7.

On the flip side, Jay received a lot of property free and clear that was community or that had community contributions to it. The Vanguard 401(k), which the trial court found to be community property, CP 504 (FF#17), was awarded to him. CP 511, 627. This 401(k) also made the \$80,000 loan that enabled Jay to purchase the Bothell Rental house (after taking \$20,000 from community accounts and putting it into the 401(k)), and the community directly paid the other \$10,000 towards closing. VRP 111/2-19. And the PCL settlement – which is partly community assets – paid for the Maui Timeshare. Yet all of these valuable assets were awarded to Jay, free and clear. CP 618-19. Under Jay’s misguided arguments, Barbara should have been awarded a share of each of these three assets.

Although Barbara is prepared to accept the trial court’s decision, these supposedly “sole” improvements made to Odin Way by Jay are questionable. In fact, Barbara testified that most of those improvements were paid for either with community cash, or out of the community HELC. VRP 78-80/8-25 (flooring, painting and landscaping); VRP 82-83/21-5 (deck); VRP 84/12-25 (stairs and sidewalk).

Barbara has her own quarrels with some of the other characterizations of property made at trial. For example, the \$66,000 “contribution” to Odin Way, by paying off the HELC out of the PCL

settlement, should be attributed to the community, because the \$60,000 community contribution to litigation expenses, and the \$19,000 allocated in the settlement to lost wages and lost stock options, Ex. 108, are community property under the rule of *Brown v. Brown*, 100 Wn.2d 729, 730, 735, 675 P.2d 1207 (1984). Furthermore, any emotional distress suffered by Jay due to the post-marital termination was necessarily suffered during the marriage, and affected the community by imposing a heavy burden of emotional and financial support on Barbara. VRP 28/1-25; VRP 610/2-6 & VRP 610-11/19-3. Nonetheless, Barbara urges this court to find that any characterization issues are harmless in light of the trial court's overall reasonable distribution which favors Jay, assigns the retirement account to Jay, and the lion's share of the debt to Barbara.

B. 2009 Taxes & Response Regarding Promissory Note Offset

1. Cross-Appeal: There is no Substantial Evidence Supporting the Finding of a \$25,000 Outstanding 2009 Tax Obligation

The trial court inexplicably found a "present outstanding community tax obligation" of \$25,000 for 2009 taxes. CP 508 (FF#22). There is no substantial evidence to support this finding; indeed, the parties had not even filed their 2009 taxes as of the date of trial. VRP 356/7-9; 563/10-13 (Jay); VRP 616/4-6 (Barbara). Because the extent of the parties' 2009 tax liability was not yet determined and therefore not

before the court, it was not possible to determine the “present outstanding community tax obligation.”

Examination of the transcript demonstrates the lack of substantial evidence to support the specific finding of a \$25,000 tax obligation for 2009. When testifying about the debts, including discussing the 2008 tax obligation and stating his opinions as to which debts should be assigned to Barbara, Jay never once made any reference to 2009 taxes. VRP 431-436/10-22. A different amount relating to 2009 taxes – “\$20,000” – came up in Barbara’s testimony that when Jay took \$20,000 out of their community savings account to put towards the closing on the Bothell Rental house, she warned him that that money was earmarked for estimated taxes with the IRS, but he told her that they would deal with the IRS later. VRP 109/16-23, 111/2-9. When asked about this, Jay denied that moving this money made it impossible to make an estimated tax payment, because he was having the best quarter of his career. VRP 415-16/12-16. As stated by Jay:

To me, it was inconceivable that there wasn’t sufficient money to make even the **five thousand dollar** payment on quarterly taxes.

VRP 416/13-16 (emphasis added).

Based on this record, this is no substantial evidence to come up with a finding of a \$25,000 “present outstanding tax obligation” for 2009.

First, estimated payments are just that – estimated payments against a tax liability not yet determined. Second, the only evidence related to 2009 taxes was the amount diverted from tax payments to the Rental house purchase – not the amount due for taxes. Third, the evidence does not even show that \$25,000 or \$20,000 was due as a quarterly estimated payment – Jay thought the amount needed for the quarterly payment would be only \$5,000.

Both parties agreed at trial that they should be given permission to file separately for 2009, VRP 563-64/22-2 (Jay); VRP 616/7-9 (Barbara), and that is what the court ordered. CP 623 ¶3.17.7 (“The parties shall file separately for the year 2009.”). The parties were separated for nearly one-half of 2009, and Jay testified that he agreed that he would be solely responsible for Vanguard taxes after separation. VRP 553/8-16. As already noted, Barbara did not get the benefit of Jay’s July or August receipts because Jay withdrew them from the joint accounts. VRP 94-95/10-15; 99/20-25. Jay testified that, under IRS rules, separated spouses filing separately base their taxes on one-half of the combined income/expenses up to DOS, and then on their own separate income/expenses after DOS. VRP 563/14-21. Therefore, the division of responsibility for one-half of community income is built right into the entire concept of married filing separately, and any further order

regarding splitting of tax liability is both redundant and over-inclusive. It is redundant as to income prior to DOS; it is over-inclusive as to income after DOS. It was an abuse of discretion to combine an order to file 2009 taxes separately with the order to split 2009 tax liability 50-50.

It does appear that the trial court's motivation here is to penalize Barbara for what it characterized as "self-direction of the community's assets." CP 508 (FF#22). There was absolutely no evidence of self-direction of any 2009 tax funds – except the evidence that *Jay* took the community money earmarked for a tax payment, and used it to buy the Rental house in his own name. The general finding of "self-direction" is not challenged because there is hotly disputed evidence upon which the trial court could have found that **2008** tax moneys were self-directed towards Barbara. But the fact remains that, without any substantial evidence upon which to base a finding of a "present outstanding community tax obligation" of \$25,000 for 2009, this portion of the court's order must be stricken.

Even if there were evidence to support the finding of self-direction with respect to 2009, by heavily saddling Barbara with nearly all the community debt, resulting in a 60-40 net value distribution, Barbara has been "punished" more than enough.

Even when regard is had for the fault of the parties and the wrong inflicted by one upon the other, the economic condition in which the decree will leave them remains the paramount concern in making a division of the property.

Friedlander v. Friedlander, supra, 80 Wn.2d at 306.

2. The Trial Court Rejected the Argument that a 50% Split is Required beyond Merely filing Separately

In his September 30, 2010, *Motion for Reconsideration of Amended Nunc Pro Tunc Decree*, Jay interpreted the “file separately” part of the order as abrogating the requirement to split the 2009 taxes 50-50, just as Barbara does here on appeal. In light of this understanding, Jay argued: “The Court should require the Wife to pay the Husband at least 50% of the \$25,000 she wrongfully withdrew for 2009 taxes, which the husband will now have to pay 100% if the parties file separate for 2009.”

CP 634. Barbara responded:

The Wife did not misappropriate any tax payments for 2009. The evidence . . . clearly showed that Mr. Congleton used the funds the parties had in savings to pay the taxes to purchase the Rental home. All of Mr. Congleton’s 2009 tax debt will be attributed to his earning and he subsequently made all the quarterly tax payments for 2009. The court ordered the parties to file separately, each should be responsible for their separate tax debt.

CP 690. The trial court denied Jay’s Motion for Reconsideration. CP 741.

Clearly, it was satisfied with the order that the parties file separately, and did not intend to go beyond that with respect to 2009 taxes.

3. The Parenthetical Reference to a Promissory Note is not Grounds for Reversal

Because it was error to order a 50-50 split of the unproven and nonexistent \$25,000 2009 tax liability, Jay's argument requesting remand for clarification of the parenthetical reference to a promissory note is mooted. If not mooted, the inadvertent promissory note reference left in the Amended Final Decree is invited error, and harmless in light of the monetary judgment.

In a pleading entitled *Respondent's Comments/Questions re: Findings, Amended Decree, Final Documents*, filed September 16, 2010, Jay proposed that Barbara's obligations to him be represented by a promissory note secured by a Deed of Trust. CP 520 ¶ 2. Along with that pleading, Jay submitted a proposed Amended Decree of Dissolution, CP 553-72, which became the model for the Amended Nunc Pro Tunc Decree issued by the trial court on September 27th. CP 616-27. Jay's proposed order would have awarded a promissory note from Barbara to Jay in the amount of \$137,668.27, which represented a "wish list" of everything Jay wanted awarded to him, rather than the more measured and temperate award ultimately made by the court. CP 560 ¶ 3.4.11; CP 561 ¶ 3.5.7; CP 572. This suggested promissory note was in lieu of a monetary judgment on the proposed order. CP 555-56.

Jay's own proposed order stated in ¶ 3.6 that "Husband shall also pay the balance of the taxes, penalties and interest owing to the IRS for the 2009 unpaid tax liability, the wife's 50% having been included in the balance owed on the promissory note." CP 561. Jay's proposed promissory note included \$12,500 for 2009 taxes. CP 572.

Jay's proposed Amended Decree was the origin of the 50% tax liability split language of ¶ 3.17.7 of the actual final Amended Decree, and of the cryptic parenthetical: "(See paragraph 3.6 which provides that the Petitioner's 50% liability for 2009 taxes has been offset against the promissory note to Respondent)." *Compare* CP 565 (Jay's proposal) *with* CP 623 (Final Amended Decree).

When the trial court properly exercised its discretion to reject the whole promissory note idea, and to instead simply order a monetary judgment against Barbara for a far more reasonable amount than the proposed promissory note, CP 617, it struck the references to the promissory note from the corresponding paragraphs of the Amended Final Decree, but it apparently missed the reference in ¶ 3.17.7. *See*, CP 620, 623, 626-27.

Any error here is clerical and harmless, in light of the clear rejection of the entire idea of a promissory note in favor of use of a judgment for the amount due. Furthermore, if there is error it is invited

error, since Jay took the position in the Motion for Reconsideration that the language he drafted, carried into the Decree as finally written, did not require a 50-50 split without further order. *See, Sdorra v. Dickensen*, 80 Wn. App. 695, 702-03, 910 P.2d 1328 (Div 2 1996).

Remand for “clarification” would be a waste of time, since it is obvious on the face of this record what happened here, and especially that the trial court intended its monetary judgment to do the work originally proposed to be done by the promissory note. Furthermore, denial of Jay’s Motion for Reconsideration demonstrates that the trial court did not intend to order a judgment for payment of 50% of the overall 2009 tax burden, but simply intended to order that the parties file and pay separately.

C. Attorney’s Fees

Pursuant to RAP 18.1, Barbara seeks an award of attorney’s fees on appeal under two theories: (1) intransigence; and (2) need and ability to pay, RCW 26.09.140.

1. Intransigence

As stated by the Court in *Marriage of Mattson*:

Intransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeals). *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985). The financial resources of the parties need not be considered when intransigence by one party is established.

In re Marriage of Mattson, 95 Wn. App. 592, 605-06, 976 P.2d 157 (Div. 2 1999) (some citations omitted).

Jay has hired good appellate lawyers, so his arguments are not intransigent on their face. And, admittedly, the trial court's ruling on the parties' detailed finances is not perfect. But nonetheless, this appeal is fueled by intransigence. The intransigence lies in failing to accept a ruling that was largely in Jay's own favor, in an attempt to grab even more than 60% of the net marital assets. The intransigence lies in ignoring black-letter law which states that "[e]ven when regard is had for the fault of the parties and the wrong inflicted by one upon the other, the economic condition in which the decree will leave them remains the paramount concern in making a division of the property." *Friedlander v. Friedlander*, *supra*, 80 Wn.2d at 260. The intransigence lies in ignoring the standard of review, which is detailed in his own brief, according broad discretion to the trial court to divide all marital property in a manner that is equitable, without mathematical precision. *Brief of Appellant* at 9-11.

The record provides a crucial insight into Jay's underlying intransigence. He is accustomed to litigation, since he serves as an expert witness as part of his consulting business. VRP 453/5-8. Shortly after the separation, he took Barbara's adult son out for lunch, in an attempt to intimidate Barbara. At that lunch, he told Barbara's son:

Your mother really doesn't want to get into a legal proceeding with me. This is what I do. And I will win. She doesn't have the stomach to see this out. And, if need be, I will continue carrying this out until nobody has a dime left, because I will not lose this case.

VRP 379/7-24.

This is the only explanation for why Jay took an appeal of a largely favorable property distribution, in the teeth of a standard of review that accords the trial court wide discretion in allocating both community and separate property between the parties in an equitable manner. In order to ensure that Jay does not achieve his goal of "carrying this out until nobody has a dime left" – essentially bankrupting Barbara through endless court process – this Court should award attorneys' fees to Barbara based on intransigence.

2. Need and Ability to Pay

Alternatively, under RCW 26.09.140, the Court has discretion to award one party to a dissolution action their reasonable costs and attorney's fees after considering the relative financial resources of the parties. *In re Marriage of Casey*, 88 Wn. App. 662, 668, 967 P.2d 982 (1997). The statute provides that, "[t]he 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 therewith . . .,” and that, “[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney’s fees in addition to statutory costs.” RCW 26.09.140.

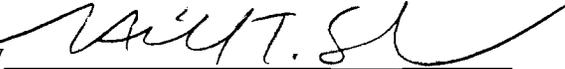
Finding #20 documents Jay’s significantly higher income for 2009. CP 506 (FF#20) (Jay \$201,000; Barbara \$135,480). The fee declarations that will be submitted pursuant to RAP 18.1(c) will document that Barbara is in need of an award on appeal, and that Jay has the ability to pay such an award.

IV. CONCLUSION

Barbara respectfully requests the following relief: (1) that the Amended Decree be modified to delete all language of the first subparagraph of ¶ 3.17.7, CP 623, so it retains only the part that states: “The parties shall file separately for the year 2009.” and then moves to the next sub-paragraph, “The parties are ordered to maintain in good order [etc.]”; (2) that the Amended Decree, so modified, be AFFIRMED; and (3) that Barbara be awarded her reasonable attorneys’ fees on appeal, plus costs.

Dated at Seattle, WA, this 2nd day of September, 2011.

SULLIVAN & THORESON

by 
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CERTIFICATE OF SERVICE

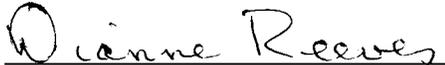
I, Dianne Reeves, legal assistant at Sullivan & Thoreson, hereby certify that on the date set forth below I served a true copy of the within BRIEF OF RESPONDENT, on all parties of record by delivering the same via U.S. Mail, first class postage prepaid, to:

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Dianne Reeves