

67128-6

67128-6

No. 67128-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

TODD K. PARKER,

Appellant,

and

SHERRY M. PARKER,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAMES DOERTY

RESPONSIVE BRIEF OF RESPONDENT

By: Edward J. Hirsch
WSBA No. 35807
Law Office of Edward J. Hirsch, PLLC
93 South Jackson Street, Suite 33995
Seattle, WA 98104
(206) 434-6682

By: Gordon Lotzkar
WSBA No. 25701
The Lotzkar Law Firm
Union Bank of California Plaza
10900 NE 8th Street, Suite 820
Bellevue, WA. 98004
(425) 450-4844

Attorneys for Respondent

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 20 AM 10:58

Table of Contents

I.	Summary of Argument	1
II.	Issues in Response to Appellant’s Brief	1
III.	Restatement of Case	2
	Introduction	2
	Parenting	3
	Maintenance	5
	Prenuptial Agreement	10
	The transfer of all real properties to Todd’s parents	10
	The family residence in Fall City	11
	The investment properties in Kittitas County.....	13
	Trial Court’s Rulings.....	17
IV.	Argument.....	18
	1. Todd was not credible	18
	2. The trial court properly awarded Sherry an equitable judgment of \$205,000	19
	3. The trial court properly awarded Sherry Lifetime maintenance of \$2,000 a month	25
	4. The trial court properly allowed the son to arrange a time with his father instead of the scheduled alternating weekend visit....	29
	5. The trial court properly awarded Sherry attorney fees based on Todd’s ability to pay and his intransigence	31
V.	Motion for Attorney Fees	33

Table of Authorities

Cases

<u>In re Marriage of Angelo v. Angelo</u> , 142 Wn. App. 622, 175 P.3d 1096 (2008) citing RCW 26.09.080. _____ at 646	20
<u>In re Marriage of Bulicek</u> , 59 Wn. App. 630, 635, 800 P.2d 394 (1990).....	25
<u>In re Marriage of Foley</u> , 84 Wn. App. 839, 845, 930 P.2d 929 (1997).....	25
<u>In re Marriage of Jacobson</u> , 90 Wn. App. 738, 743, 954 P.2d 297 (1998).....	29
<u>In re Marriage of Konzen</u> , 103 Wn.2d 470, 477-478, 693 P.2d 97 (1985);	21
<u>In re Marriage of Landry</u> , 103 Wn.2d 807, 809, 699 P.2d 214 (1985).....	22
<u>In re Marriage of Morrow</u> , 53 Wn. App. 579, 590, 770 P.2d 197 (1989).....	34
<u>In re Marriage of Terry</u> , 79 Wn. App. 866, 871, 905 P.2d 935 (1995)	21
<u>In re Marriage of Thomas</u> , 63 Wn. App. 658, 660, 821 P.2d 1227 (1991)	22
<u>In re Marriage of Wagner</u> , 111 Wn. App. 9, 18, 44 P.3d 860 (2002).....	33
<u>In re Marriage of Washburn</u> , 101 Wn.2d 168, 178, 179, 677 P.2d 152 (1984)	22, 26
<u>In re Marriage of Zahm</u> , 138 Wn.2d 213, 226-227, 978 P.2d 498 (1999)	25
<u>In re Marriage of Zier</u> , 136 Wn. App. 40, 46, 147 P.3d 624 (2006)	21

Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280
(2001)(citations omitted) 29

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) 22

Statutes

RCW 29.09.080..... 21, 25, 26

RCW 29.09.080(4) 21

RCW 26.09.090..... 26

RCW 26.09.140..... 31, 34

RCW 26.09.187..... 29

Rules

RAP 18.9(a) 33

RAP 18.1 34

I. SUMMARY OF ARGUMENT

Before leaving the marriage, the husband transferred all of the marital properties to his parents. In the dissolution proceedings, he sought to discharge his debts to his wife for unpaid awards of maintenance and attorney fees in bankruptcy. He also tried to turn their two children against her.

The trial court found that he was not credible. As no assets remained to divide, the court awarded the wife an equitable judgment of \$205,000, representing one half of the value of the former family residence, plus lifetime maintenance of \$2,000 a month.

In his frivolous, fact-based appeal, the husband merely reargues his case. This Court should affirm the trial court's decisions—and award the wife the attorney fees and costs incurred in responding to the appeal.

II. ISSUES IN RESPONSE TO APPELLANT'S BRIEF

1. Did the trial court properly characterize and divide the parties' property, awarding the wife an equitable judgment of \$205,000, representing one half of the value of the former family residence, transferred by the husband to his parents before trial?
2. Did the trial court properly award the wife lifetime

maintenance of \$2,000 a month which was one half of the husband's monthly net income, based on the required statutory factors and the fact that insufficient assets remained for her support after the husband wrongfully transferred all real properties to his parents before trial?

3. Did the trial court properly order a residential schedule where the 14 year old son resides with the mother and the 17 year old daughter with the father, with alternating weekends with the other parent or, alternatively, to arrange a time with that parent according to the child's schedule?

4. Did the trial court properly award the wife \$38,010.32 in attorney fees, based on his higher income and his intransigence?

III. RESTATEMENT OF THE CASE

Introduction

After 17 years of marriage, Todd Parker filed a petition for dissolution of his marriage to his wife, Sherry Parker. CP 1-5. King County Superior Court Judge James Doerty presided over the dissolution trial on February 22, 23, and 24, 2011. CP 199. At the time, their daughter, Kenzie, was 17 years old, and their son, Grayson, was 14. RP 73, 299.

Parenting

While the case was pending, Sherry and Todd did not have a temporary parenting plan for their children. RP 90-91. The children were free to go between their parents' homes any way they wanted to, as Todd was staying at his parents' house, which was right across a gravel road from the family home. RP 43, 90-91, 220-222.

Family Court Services social worker Kathleen Kennelly conducted a parenting plan evaluation, looking at "the amount of parenting that the parents had, the intensity of the parenting, the relationship between the children and the parents, if there's any risk factors that we consider, and the age of these children". RP 14-16; Ex. 23.

At trial, Todd demanded custody of the children, alleging Sherry had driven drunk with the child in the car and had assaulted their daughter. RP 96-97, 211-212.

Ms. Kennelly dismissed Todd's allegations Sherry. RP 16-18, 20, 30-31. She testified that Todd "was responsible" for "estrangement" of the children from their mother, who "was pretty much vilified." RP 30-31, 37-38, 42-43; Ex. 23 at 12. She further testified that Todd "had planned to marginalize the mother's role in

the children's life and has established an alliance between himself and Kenzie to the detriment of the mother's relationship with Kenzie." RP 42-43.

In her written report, Ms. Kennelly detailed Todd's "imperious manner" toward Sherry during the dissolution proceedings:

Mr. Parker has acted in an imperious manner in his filing of this divorce. He served Ms. Parker when she was in severe pain from a back injury and prior to a surgery. His initial intent was to exclude her from the family residence and for him to remain there with the children in spite of the fact that she has always been the primary parent for these children with the exception of the time period when she was incapacitated due to her back injury. He has had her sign quit claim deeds to family properties; he has been reluctant to provide support for her and is critical of how she spends the support money that she receives. Mr. Parker is very judgmental of Ms. Parker and her allegation that "he wants me to disappear" is credible. Fortunately, the Court has determined that Ms. Parker should be compensated for her years in the marriage and has ordered support, housing and a vocation assessment for her.

Ex. 23 at 13

Todd did not have Grayson for an overnight visit until right before trial, although Sherry testified that she encouraged the children to see their father and never tried to prevent them from seeing him. RP 91-92, 220-222, 312-313, 317. Ms. Kennelly testified that Grayson told her that he "did not get along that well with his father, that he felt somewhat distant" and "estranged" from

him. RP 20-21, 23, 34.

To make matters worse, Todd stopped paying for counseling for his son, blaming the counselor for allegedly “double dipping” on his hourly fee by providing counseling to both Grayson and Sherry. RP 225-227.

Ultimately, Ms. Kennelly recommended a 50/50 residential schedule where Grayson would be with Sherry and Kenzie with Todd, with alternating weekends with the other parent, except that Kenzie “should have the option of visiting her mother when she chooses so as to minimize the conflict between the two of them and hopefully give them time and space to expand that repair their relationship.” RP 210-22, 34; Ex. 23.

Sherry accepted this recommendation, except she believed that it was not fair that Kenzie “got to have a choice and Grayson didn’t” and that he was mature enough to do so. RP 316-317.

The trial court agreed with Sherry, adopting Ms. Kennelly’s recommendations, but allowing both children to spend alternating weekends with the other parent or to “arrange time with that parent according to their schedules.” CP 228.

Maintenance

Todd made it clear that he had “no problem” with paying

Sherry maintenance for three or four years, just not “over half my paycheck is fair.” RP 156.

At the time, Sherry was working at Evergreen Scale Models, operating a packaging machine for \$11 an hour. RP 155, 325, 332. She had limited education and job skills. She left high school in the 11th grade, eventually earning a GED. RP 291. Before the marriage, she worked as an oiler, assisting backhoe operators. RP 292. After the marriage in 1993, Todd and Sherry decided that Sherry, then pregnant with their daughter, should stop working and stay at home as a mother. RP 66, 294, 297-299, 311-312, 320.

Todd played up Sherry’s work experience and skills, trying to make her appear capable of working as a dental assistant or with computers, while also depicting her as a debilitated alcoholic. RP 153-154. Although, she took a class on how a computer works, did not know how to use word processing or even to send an email. RP 330-331. She took a dental assisting course which was not state certified but did not look for a job in the field because Todd wanted her to be available for their children. RP 320. She also sold Avon cosmetics, but Todd admitted that she only “made a little bit” of money at it, just enough “to buy my daughter and her cosmetics”. RP 153-154, 333-334. Todd further admitted that right

after her surgery, which was related to injuries sustained in a car accident in 2004, Sherry had medical problems that interfered with her working. RP 24-25, 135-136, 156, 307.

Todd prevented Sherry from receiving a career assessment and guidance by refusing to pay for the services, as ordered by the court before trial. RP 113-117. At trial, the career counselor, Janice Reha, opined that a hypothetical woman with Sherry's background would face significant obstacles in attempting to enter the workforce without a consideration of whether her job skills were transferrable, a career assessment, and specialized training in order to find employment. RP 117-121, 125.

Compared to Sherry, Todd was much better off financially. He had steady work as a carpenter in union local 1147, in a position as foreman. RP 146-147. He initially claimed that his monthly expenses of \$4,700 exceeded his monthly net income was \$4,100, but, in explaining how he made ends meet, he revealed that he actually did "Extra work.". RP 142-145, 150, 225; Ex. 27, 137.

He also revealed that he was receiving financial support from his parents. RP 150, 205-206, 225. He and Sherry received a great deal of support from his parents during the marriage,

including gifts of real estate and living in one of their houses without paying rent. RP 68, 98, 101-103, 227-230, 239, 265. Throughout the dissolution proceedings, they provided Todd with funds, did not require him to pay rent, bought Kenzie a car, and offered him real estate to give to Sherry to settle the case. RP 205-210.

At trial, it was clear that Todd's parents were intimately involved in his financial matters. He testified that his paycheck was deposited to an account to which his mother had access. RP 190. This was the case during the marriage as well. Sherry testified that Todd "handled everything" financial during the marriage and when bills needed to be paid, he "took them over to his mother, the bookkeeper." RP 150-151, 298, 323, 345.

During the proceedings, Todd avoided a great deal of his financial obligations to Sherry. He disobeyed court orders to pay her attorney fees and also the appraisal fees for all properties that he used to own. RP 147-149. At trial, he admitted that he "never paid \$2,500 per month" to Sherry, as ordered. RP 166.

Todd filed for chapter 7 bankruptcy protection on January 11, 2011, just days before the original trial date of January 24, 2011. RP 140. He admitted that he did so in order to avoid his court ordered obligations to Sherry, among other debts. RP 140,

159. He testified that he “had to go into bankruptcy” because if he “didn’t pay everything that was ordered to me to Sherry...they’d drag me back into court”. RP 142, 179, 249. He sought to discharge \$3,972 in spousal maintenance, awards of attorney fees owed to Sherry, \$1,800 owed to Family Court Services for their parenting plan evaluation, among other debts. RP 140-141, 164-167, 170, 172-173.

On cross examination, it was revealed that Todd, in his bankruptcy petition, sought to discharge debts that did not exist. RP 160. For example, he listed a \$5,000 debt with Wells Fargo for his daughter’s car loan, then admitted that the loan “was a secured line of credit through my parents through Wells Fargo”, that his daughter “owes \$5,000” and was “making the payments”, and that he has “no responsibility for this loan”. RP 132, 162-164; Ex. 136.

He also listed “an unknown amount” of money allegedly loaned by his own parents for attorneys’ fees and so he “could live”, but he only proof of this obligation was “a piece of paper has got a tally on it” which he did not bring to court, and in his financial declaration, dated February 26, 2010, he did not list any debts to his parents. RP 184-186; Ex. 137.

Prenuptial Agreement

Todd contended that a prenuptial agreement controlled the division of property. Todd testified that Sherry signed the prenuptial agreement at his insistence, but with “no pressure”, three days before their wedding, while she was several months pregnant with their daughter and her parents, who were both diagnosed with cancer, were too ill to attend the wedding. RP 70-73, 245-247, 294, 296. Sherry testified to “going through” the prenuptial agreement, but not having the time to meet with a lawyer or even consult with a friend before she signed it. RP 297.

The transfer of all real properties to Todd’s parents

Todd claimed that there were no assets, community or separate, to divide with Sherry. RP 195. It turned out that he had transferred their real properties to his parents in 2005 and 2008, baldly asserting at trial that they were worthless, without providing any documentary evidence of their values. These properties included the family home in Fall City and at least 40 investment properties in Kittitas county. At trial Todd tried to frame the transfers as beneficial to both Sherry and him, claiming it relieved them of over \$700,000 in debt to his parents. RP 201.

The family residence in Fall City

Todd testified that when he turned 18 his parents gave him a property adjacent to his parents' home, located in Fall City. RP 68, 98. There was a partially finished house on the property and a few years later, Todd built the house. RP 69, 98. Todd claimed that his father loaned him \$70,000 to build the house, and that they signed a promissory note for that amount with a 30 year term at 12.5% interest in August 1985. RP 69, 98. Todd and Sherry never made any payments on the promissory note. RP 70, 98-99.

The family resided in this house until 2005 when they signed a quit claim deed, transferring it to Todd's parents, and moved into his parents' bigger house adjacent to the family home. RP 101-103. Todd and his father testified that Todd and Sherry agreed to pay rent, but ultimately lived in the house rent free. RP 101-103, 265.

At trial, Todd contended that the balance on the promissory note was a community obligation that he and Sherry owed his parents. RP 100. He testified that they did not make any payments on the obligation over the years and that interest was accruing on the balance. RP 100-101. Todd's father, Luther Parker testified in Todd's support that both Todd and Sherry owed him the balance on

the promissory note, which he calculated to be a total of \$173,000 in principal and interest. RP 264, 271.

It was disputed, however, if Todd's father ever intended to collect on the promissory note or if it was only on paper. Sherry testified that she was never aware of any money that was owed to Todd's parents or even of any promissory note related to the family home. RP 350. She did not recall talking with Todd about transferring the family home to Todd's parents in order to get rid of a loan. RP 353. She recalled that, when she signed the quitclaim deed, Todd just told her that they were signing over the family home to his parents and then moving into their bigger home. RP 353. She just signed the quitclaim deeds, because it "was expected of me" and she trusted Todd. RP 360-361.

Whether the debt was illusory or not, Todd contended that the transfer of the family home to his parents relieved Sherry and him from this community obligation. RP 104-105, 271-272. The debt on the promissory note no longer existed, according to Todd and his father. RP 104-105, 271-272. Todd testified that his parents has "been paid" and that the debt "was cleared up through promissory note and giving the property back." RP 174, 179.

Another concern was whether any equity in the family

residence was transferred to his parents. Todd testified that it was a “fair swap” to transfer the property in exchange for relief from the debt, claiming that he did not have any equity in the house. RP 101, 104-105. He did not provide documentary evidence of the value of the house at any time, thereby preventing the court from resolving this issue. However, after the trial, the court directed counsel to find evidence of the value of the house. RP 395-399. Then the court valued it at \$411,000 based on a 2005 assessment. CP 91, 98; Ex. 38.

The investment properties in Kittitas County

Sherry and Todd, along with Todd’s parents, owned at least 40 investment properties, all of which Todd transferred entirely to his parents in 2008, baldly asserting that they all were worthless and that the transfer relieved them of about \$500,000 in community debt. RP 270-271. At trial, extensive documentary evidence, however, told a different story: The county’s assessed values “sky rocketed” over the years. RP 232.

Around 1989, Todd’s father started purchasing properties in Kittitas county as investments. RP 260-261, 239, 105-106. Todd testified that from 1993 to 2009, his father put “our names”—his and Sherry’s—on the properties. RP 239. Todd further testified

that he considered all of these properties as retirement investments for himself and Sherry, as a marital community. RP 227-230.

It was disputed whether Todd and Sherry owned these properties outright as gifts or owed his parents some amount for them. Todd gave inconsistent accounts as to how he and Sherry acquired their share in these properties. In his first account, Todd's parents gifted an interest in the properties to him and Sherry. He repeatedly testified that he "Sherry, my mom and dad" had a verbal agreement that his parents would purchase and develop the properties, and they would split the profits when they sold them. RP 69, 106-107, 238-239, 241. He and Sherry did not have to contribute any funds, as they did not have any. RP 108. Todd testified that he just "would work, I would sweat" at the properties. RP 239.

In his other account, Todd claimed that, before the marriage, he and his father verbally agreed that he would pay his father half of the purchase price of the properties someday. RP 66, 202.

In April 2008, Todd and Sherry signed quit claim deeds, transferring the properties in Kittitas county to Todd's parents. RP 109-113, 230-231. At trial the reason for the transfer was hotly disputed.

Todd contended that the “value dropped” by 2008, so his only option was to quitclaim the properties to his parents. RP 237-238. He testified that in 2007 they discovered that they did not own the water rights to the properties and that in 2008 Kittitas County started a water moratorium. RP 108-109. Todd’s father also testified that “with the economy and the water moratorium” the values were in the tank. RP 260-261.

Challenged on the value of the properties, Todd was all over the map. He testified repeatedly that they were “worthless”, but also that they were “just about 1989, 1980 prices.” RP 109, 231, 237, 241-242.

Worse, Todd did not provide any documentary evidence showing what his father paid for the properties or supporting his alleged current values for them. He avoided any responsibility for needing to do so, testifying “I don’t own the properties.” RP 238-239, 241-242.

Todd claimed that he and Sherry discussed what to do with the properties and agreed to quitclaim them back to his parents. RP 109-113; 128-129. But Sherry disagreed, testifying that when she signed the quitclaim deeds, she did not know what they were for. RP 321. Todd just asked her to sign them and she did so

without reading them because she “always did what I was asked to do.” RP 321-322.

As of the time of trial, Todd’s name was still on the title of the properties in Kittitas County. RP 129. However, he had claimed on his bankruptcy petition that he did not own any real properties. RP 195. He vigorously denied that he owned any other real property. RP 131.

Todd explained that he was still on the titles despite signing the quit claim deeds in 2008, because his parents waited two and a half years, to December 20, 2010, two months before the original trial date, to record the deeds, including the deed to the family home in Fall City. RP 202, 230-231. He claimed that they did not have the \$1,500 or so needed to have the deeds recorded at the time. RP 129, 231-235. However, Todd’s father gave a different, less innocent explanation for why he waited until right before trial to record the deeds. He testified that he waited because Sherry’s attorney was “trying to claim all that property”, as part of the marital estate. RP 270.

Sherry’s attorney confronted Todd with documents from the county assessor, listing the current owners as Todd Parker and his father, Luther Parker, as of November 5, 2010, and providing

values of the properties. RP 233-235. Two of the properties increased in value from \$35,000 in 2009 to \$80,000 in 2010. RP 232-233; Ex. 73, 74. As of 2007, a series of properties were valued at \$198,540, \$46,510, \$83,980, and \$77,250 respectively. RP 234-237; Ex. 79, 82-84. Other properties were valued at \$268,180 and \$24,900 as of 2008. RP 233. One was valued \$344,100 in 2010. RP 233. Todd admitted that there were no mortgages or encumbrances on any of the properties. RP 236-237.

Trial Court's Rulings

The trial court issued a detailed memorandum ruling on March 9, 2011, following by final orders on April 8 2011. CP 125-130, 199-211. The court found that Todd was “not a credible witness” based on his “inconsistent and self serving testimony” and “his failure to provide records, documents, appraisals or other hard factual financial data regarding the residential and investment properties.” CP 125-129, 204.

The court invalidated the prenuptial agreement, ruling that Sherry “had insufficient opportunity to intelligently and voluntarily sign it.” CP 200. Todd’s retirement account was divided equally between the parties, but no community or separate real properties were listed on the final orders. CP 200-201, 206-208. Todd was

assigned any debt left on the promissory note “which was paid off when the house was quit claimed” to his parents. CP 201. Sherry was awarded lifetime maintenance of \$2,000 a month due to the fact that the “assets are insufficient to contribute” to her support. CP 201-202. She also was awarded attorney fees of \$38,210.86, based on her need and Todd’s ability to pay, as well as for his intransigence during the proceedings and at trial. CP 202, 205.

Todd filed an unsuccessful motion for reconsideration, followed by this appeal. CP 248.

IV. ARGUMENT

1. Todd was not credible.

Todd does not challenge the trial court’s finding that he was not credible. App. Br. at 6. This unchallenged finding, a verity on appeal, supports the court’s decisions regarding property, maintenance, parenting, and fee awards. It is supported by lengthy and detailed findings of fact, contained in the court’s memorandum ruling, which was incorporated, in part, into the findings of fact and conclusions of law and the decree of dissolution. CP 125-130, 199-211.

The finding that Todd was not credible alone would sustain the trial court’s awards of the equitable judgment and the attorney

fees because it rests on Todd's persistent failure to provide documentary evidence regarding the values of the residential and investment properties as well as his reason for transferring them back to his parents.

On appeal, Todd's strategy is to divert this Court's attention from the trial court's finding that he was not credible, along with the finding that follows from it, that he was "motivated to avoid valuation and/or distribution of these properties in divorce", as his father's testimony "supports that he was". Memorandum order at 3. Instead, Todd merely reargues his case, relying largely on his father's testimony and asserting that where he failed to provide necessary evidence, there was "no evidence" to support the trial court's decisions. Each one of the trial court's decisions should be affirmed.

2. The trial court properly awarded Sherry an equitable judgment of \$205,000.

Todd contends that the trial court mischaracterized the family home in Fall City as community property and, essentially, properly characterized as his separate property, the court would have lacked the authority to condone his transfer of the property, regardless of the effect on the marital community, and also to

allocate any portion of its value to Sherry as an equitable judgment.

In fact, the trial court, in the final orders, did not characterize the family residence as community property; it did not characterize it at all; because Todd transferred ownership of this asset to his parents before trial and it was no longer before the court for distribution. CP 200-201.

The court merely construed the family residence “as a gift to the community” in its memorandum ruling issued on March 9, 2011, before the court heard additional argument and entered the final orders on April 8, 2011, then ruled on reconsideration on May 2, 2011. RP 440-445; CP 125-130, 199-211, 248. Todd did not assign error to the court’s decisions in its memorandum ruling, which was itself not a final order.

In the findings of fact and conclusions of law, the trial court made detailed findings regarding Todd’s financial misconduct in transferring the family residence and the investment properties to his parents before trial

To compensate, the trial court, in the decree, awarded Sherry an equitable judgment of \$205,000. CP 206. This was proper. Our courts may consider a spouse’s misconduct regarding property in dissolution proceedings. In Angelo v. Angelo, 142 Wn.

App. 622, 646, 175 P.3d 1096 (2008), the Court of Appeals concluded that the trial court, “using its equitable powers, may allocate the remaining separate or community property or enter judgment against one spouse in a dissolution decree to account for wrongful transfers by one spouse”, citing RCW 26.09.080.

In any event, even mischaracterization is not grounds for setting aside a trial court's allocation of liabilities and assets, since what controls is not the character of the property, but the mandate to make a just and equitable distribution of it. See RCW 26.09.080; In re Marriage of Konzen, 103 Wn.2d 470, 477-478, 693 P.2d 97 (1985) (court need not award separate property to its owner). A dissolution court's mischaracterization of property is rarely a proper basis to reverse the court's property distribution. In re Marriage of Zier, 136 Wn. App. 40, 46, 147 P.3d 624 (2006). The court's paramount concern when distributing property is the economic condition in which the decree leaves the parties. In re Marriage of Terry, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). See, also, RCW 29.09.080(4) (court must consider economic circumstances of the parties).

What is fair is for the trial court to decide, a decision that will not be disturbed on appeal absent a manifest abuse of discretion.

In re Marriage of Konzen, 103 Wn.2d 470, 477-478, 693 P.2d 97 (1985); accord Marriage of Washburn, 101 Wn. 2d 168, 179, 677 P.2d 152 (1984).

Thus, in his appeal, Todd bears a “heavy burden” of showing that “no reasonable judge would have reached the same conclusion” as did the judge here. In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).

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

Here, the trial court had the authority—and the duty—to compensate Sherry with an equitable judgment as insufficient assets existed at trial to distribute due to Todd's financial misconduct in transferring all the real properties beyond the reach

of the court before trial. It is irrelevant whether the court considered the family residence “as a gift to the community” or as Todd’s separate property. What is relevant is the court’s “fair and equitable conclusion” to award Sherry an equitable judgment to account for the wrongful transfer of all of the real properties by Todd.

As at trial, Todd again contends that his transfer of the family residence to his parents benefitted the community by extinguishing their debt on the promissory note. However, the trial court rejected Todd’s “inconsistent and self serving” testimony that he and Sherry, as a marital community, owed his father this debt. CP 126. The court characterized the promissory note as Todd’s separate debt and allocated it to him. CP 201, 209. There was no community benefit to the transfer.

In addition, substantial evidence indicated that this debt was illusory. Sherry testified that she never heard of the debt. RP 350, 353. She and Todd agreed that they never paid on the debt. RP 70, 98-101. And Todd’s father never collected on the debt. RP 264, 271. Relief from a non-existent debt did not benefit the community.

Most importantly, the evidence at trial showed that the

equity in the house exceeded any obligation on the promissory note, even including interest that may have accrued. At trial, Todd failed to provide documentary evidence of the value of the property. After trial, counsel submitted evidence that it was worth \$411,000 in 2005, far in excess of the \$173,000 that Todd's father testified was owing on the promissory note. RP 264-271.

Todd also reargues his position that his transfer of the "worthless" investment properties in Kittitas County benefitted the community by relieving them of nearly \$500,000 in debt to Todd's parents. The trial court rejected this position. Its finding that Todd, in making the transfers, breached his fiduciary duty to the community is supported by the substantial evidence at trial that Todd failed to provide documentary evidence of the value of the properties, that the county assessor's records showed that the properties had increased in value over time, and even his father's testimony that he recorded the deeds, completing the transfer, just before trial because Sherry was seeking the properties in the dissolution case. RP 202, 230-231, 235-237, 242. This finding too should be affirmed.

3. The trial court properly awarded Sherry lifetime maintenance of \$2,000 a month.

Todd contends that the maintenance award was based only on the incorrect conclusion that he breached his fiduciary duty to the community by deeding the properties to his parents, without considering how he would pay the maintenance when he got older and whether Sherry should work more hours, among other things. Like his other issues on appeal, Todd merely reargues the facts. The award of maintenance was properly crafted as “flexible tool” to equalize the parties’ standard of living and should be affirmed.

Trial court maintenance decisions are reviewed for abuse of discretion. In re Marriage of Zahm, 138 Wn.2d 213, 226-227, 978 P.2d 498 (1999). An abuse of discretion occurs when the court bases its decision on untenable grounds or for untenable reasons. In re Marriage of Foley, 84 Wn. App. 839, 845, 930 P.2d 929 (1997).

A trial court has not only the authority but the duty to award maintenance where necessary to reach a just and equitable distribution of property. RCW 26.09.080. The court’s paramount concern in distributing property and awarding maintenance is the post-dissolution economic position of the parties. In re Marriage of

Bulicek, 59 Wn. App. 630, 635, 800 P.2d 394 (1990).

RCW 26.09.090 permits awards of maintenance “in such amounts and for such periods of time as the court deems just”. The court is to consider all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently ...;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

RCW 26.09.090.

Todd completely ignores that maintenance, as one tool to be employed in pursuit of the goal of equitable dissolution, is "not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." In re Marriage of Washburn, 101 Wn. 2d 168, 179, 677 P.2d 152 (1984).

Here, the court could not make a “just and equitable” distribution of property under RCW 26.09.080, because Todd

transferred community assets to his parents, who were not before the court. "Where the assets of the parties are insufficient to permit compensation to be effected entirely through property division, a supplemental award of maintenance is appropriate." In re Marriage of Washburn, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). This is precisely what the trial court did here: The court, after considering extensive evidence as to the required statutory factors, awarded lifetime maintenance, finding there was "limited property that is available to this Court to attempt to distribute" and "the assets are insufficient to contribute to the support of the wife":

For purposes of maintenance and child support the court finds that the father's gross monthly income to be \$5,880.00 and the mother's to be \$1,175.00. The earning history of the parties, the testimony of Janice Reha, and the wife's medical history establish that these amounts are unlikely to vary substantially in their working lifetime. The seventeen year term of the marriage requires that the parties be placed on an equal economic footing. In addition, the husband had been the sole and exclusive financial manager for the community but breached his fiduciary duties to the community and, in fact, took action to purposefully transact affairs for the community that was in his present future interest to the detriment of the community. As such, there is limited property that is available to this Court to attempt to distribute and thus this Court believes that the wife should be entitled to lifetime spousal support.

The Court orders a maintenance payment of \$2,000 per month for the wife's lifetime. The statutory factors in RCW 26.09.90 alone all support the maintenance award. In considering the term of the award the court is mindful of the

similarities in this case to the facts in In re Marriage of Morrow, 53 Wash. App 579 (1989). Mr. Parker has been the sole and exclusive financial manager for the community and has breached his fiduciary duties in quitclaiming away the substantial real properties identified at trial without reasonable, prudent or good faith regard for the community interest. While anticipating a secure future for himself based on his parents wealth Mr. Parker has done absolutely nothing to secure the future of his wife and children. In fact he has taken affirmative steps to jeopardize that future. It should be noted that court is not finding fraud in the quitclaim transaction but breach of fiduciary duty in conduct of the community's financial affairs. In addition, the husband, as additional spousal support shall pay off the loan on the purchase of the wife's car.

The Court finds that the assets are insufficient to contribute to the support of the wife so the husband is ordered to pay permanent maintenance.

CP 201-202, 209.

Todd mainly challenges the duration of the maintenance award. As described in the sections above on the division of property, substantial evidence supports the court's findings that Todd wrongfully transferred the parties' real properties to his parents in order to avoid the valuation and division of them in the dissolution case. With no real prospects of rising above her \$11 an hour job, Sherry will need the award in order to lead a modest lifestyle on par with Todd's (based on his income; not his parents' wealth). RP 24-25, 66, 113-125, 135-136, 291-299, 307, 311-312, 320, 325, 330-334. Todd only has himself to blame for refusing to

pay for the court-ordered career assessment, which may have put Sherry on the path to more self-sufficient employment. RP 113-117, 125.

This Court should affirm the trial court's use of maintenance in this case as a "flexible tool" to put Sherry on a relatively equal economic footing with Todd for the rest of her life.

4. The trial court properly allowed the son to arrange a time with his father instead of the scheduled alternating weekend visit.

Trial courts are given broad discretion to fashion a parenting plan based upon the child's best interests, after consideration of the statutory factors. Marriage of Jacobson, 90 Wn. App. 738, 743, 954 P.2d 297 (1998). Discretion is abused only if the decision is manifestly unreasonable or based on untenable grounds. Jacobson, 90 Wn. App. at 743. Appellate courts are "extremely reluctant" to disturb child placement decisions. Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001).

Here, the trial court properly considered the statutory factors under RCW 26.09.187 and designed a parenting plan in the children's best interests. The court ordered that the children would spend equal amounts of time with each parent, with Kenzie residing

with her father and Grayson with his mother, and with each child spending alternating weekends with the other parent, as recommended by the parenting evaluator, Ms. Kennelly. CP 210-222, 228; Ex. 23. However, both children would not be “forced” to go to the alternating weekend visit and could instead “arrange a time with that parent according to their schedules”:

Kenzie shall reside with the father and Grayson shall reside with the mother. The children will spend alternate weekends with each parent so that they both spend the weekend in the home of one of the parents together. ...

If Kenzie or Grayson do not want to spend any residential times with the other parent they should not be forced into doing so and should arrange a time with that parent according to their schedules.

CP 228.

The court was persuaded by Ms. Kennelly’s extensive testimony and written report that Todd endeavored to “marginalize” Sherry, “estrangle” the children from her, and put them in the middle of the conflict. RP 20-24, 30-31, 37-38, 42-43. Ms. Kennelly recommended that only Kenzie be allowed to opt out of the alternating weekend visit, based on Grayson’s age of 14. RP 210-222; Ex. 23.

The court, in its memorandum ruling, explicitly considered Grayson’s “age differences”, yet determined that it was “more

significant” to make the provision fair to Grayson in light of Todd’s extensive efforts to alienate the children from their mother. CP 126. The court’s finding about Todd’s “lack of credibility” and his “pile on” of disparaging remarks about Sherry to the children was important in making the parenting plan. CP 126. The court discounted Todd’s testimony that Sherry was a “danger” to the children. RP 95. Instead it believed her testimony that she “encouraged” the children to see their father. RP 312, 313. The decision had nothing to do with fairness to Sherry, as Todd contends.

By allowing Grayson to “arrange a time” with his father, other than the alternating weekend, the court thoughtfully removed the boy from the “context of alienation” created entirely by Todd. CP 126. The trial court’s decision regarding the parenting plan should be affirmed.

5. The trial court properly awarded Sherry attorney fees based on Todd’s ability to pay and his intransigence.

The trial court properly awarded Sherry \$38,010.32 in attorney fees and costs under RCW 26.09.140 and due to Todd’s intransigence. CP 129-130, 202-203, 205, 207, 210.

Todd, in his appeal, does not challenge the court’s decision to award fees based on her need and his ability to pay under RCW

26.09.140. Todd had the ability to pay the fee award. He testified that he had “steady work” as a union carpenter, grossing about \$5,800 a month. RP 142-147, 150, 225; Ex. 27, 137. He further testified to the extensive financial support by his parents throughout the marriage and during the dissolution proceedings. RP 150, 205-206, 225. It is undisputed that all of the parties’ properties had been transferred to Todd’s parents and it was obvious that he would be receiving the properties back in the future.

Sherry was in need of the fee award. She was earning only \$11 an hour at a low skilled job with no prospects of improvement. RP 117-121, 125, 153-155, 291-292, 325, 330-334.

The fee award should be affirmed based on his ability to pay and her need for the award of fees.

Todd also does not challenge the finding that he was intransigent. Rather, he contends that the fee award was based on the incorrect finding that he breached a fiduciary duty to the community. While substantial evidence supports this finding, the court found Todd to be intransigent for multiple reasons, including his foot dragging and disobeying court orders:

The Petitioner/husband has been intransigent. He has sought to avoid responsibility for his family. He has failed to comply with court orders. He has made the trial more

difficult by failing to provide evidence of transactions and property values. He has attempted to delay the trial with a bankruptcy that apparently has nothing to do with trial issues. Therefore based on intransigence and his comparative greater earning ability (double at the very least) he is ordered to pay the Respondent's attorney fees in the amount of \$38,010.32 and judgment should be entered to that extent.

CP 202-203.

Substantial evidence in the record supports these findings. RP 91-92, 113-117, 132, 140-142, 147-149, 153-154, 162-167, 170-175, 179, 184-186, 220-222, 225-227, 233-242, 249, 312-313, 317. The award of attorney fees should be affirmed on the additional ground of intransigence.

V. MOTION FOR ATTORNEY FEES

This appeal is frivolous. RAP 18.9(a). After two years of litigation, the trial court achieved a just and equitable distribution of the property before it completely in accord with its statutory authority and its discretion. Given these rules and the facts of this case, not a single issue raised by Todd is debatable. See In re Marriage of Wagner, 111 Wn. App. 9, 18, 44 P.3d 860 (2002) (an appeal is frivolous if there are no debatable issues upon which reasonable minds may differ and it is so devoid of merit that there is no possibility of reversal).

Moreover, Todd should pay Sherry's fees because of his intransigence. The law is well established that intransigence will support an award of attorney's fees. In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Not only was this appeal pointless, it was expensive. Todd subjects Sherry to another round of litigation without any credible legal and factual basis. This is simple intransigence.

Finally, Todd should pay Sherry's fees because of his greater ability to do so, just as the trial court did. CP 64. RAP 18.1 and RCW 26.09.140. The statute provides that:

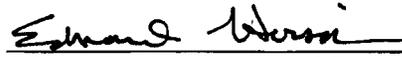
The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection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

The record established that Todd earns much more than Sherry and that he has considerable access to greater wealth through his parents. RP 137, 142-147, 150, 155, 205-206, 225.

His earnings are four times those of Sherry. RP 142-145, 150, 155, 225, 325, 332. Given this disparity, Todd should pay Sherry's fees and costs.

Dated this 23rd day of February 2012.

Respectfully submitted,


EDWARD HIRSCH, WSBA #35807


GORDON LOTZKAR, WSBA #25701

Attorneys for Respondent

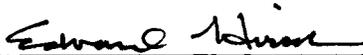
DECLARATION OF MAILING

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 23, 2012, I arranged for service of the foregoing Responsive Brief of Respondent to the Court and the parties to this action as follows:

Office of Clerk Court of Appeals – Division I 600 University St Seattle, WA 98101-1176	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered
Kenneth W. Masters Shelby R. Frost Lemmel Paul Crisalli Master's Law Group, PLLC 241 Madison Avenue North Bainbridge Island, WA 98110	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Electronic Mail
Donna J. Campbell P.O. Box 1163 North Bend, WA 98045-1163	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Electronic Mail

DATED at Seattle, Washington this 23rd day of February, 2012.



Edward J. Hirsch WSBA# 35807
Attorney for Respondent