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No. 69133-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

MARY M. WRIGHT,

Respondent/Cross-Appellant,

and

KIM B. WRIGHT,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE WILLIAM DOWNING

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN 23 PM 2:03

BRIEF OF APPELLANT

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App. B	Washington State Bar News Article
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I. INTRODUCTION

After 31 years of marriage, the husband is at the end of his lucrative career as a neurosurgeon due to his age, 59, and a “nagging wrist injury and cataracts.” (Finding of Fact (FF) 5, CP 250) While the trial court recognized that the husband would likely stop working less than three years after the decree was entered (FF 12, CP 254), the trial court’s property division and maintenance award condemns the husband to many more years of “pulling the plow,” with little to show for three decades building a substantial community estate with the wife. Despite stating that its goal was to put the parties in “roughly equal financial positions” (Conclusion of Law (CL) 4, CP 257), the trial court’s property division leaves the wife at age 60 with over \$10 million in largely liquid assets and \$30,000 a month in maintenance for the next three years, while the husband is left with \$3.5 million less, in largely illiquid assets, few retirement accounts, and an obligation to pay a judgment of \$1.7 million in addition to maintenance of over \$1 million.

A significantly disproportionate division of property *or* substantial maintenance may be warranted to place spouses in “roughly equal financial positions” when the high income earner has many years of employment left and an opportunity to

accumulate a separate estate from post-dissolution earnings. A disproportionate property division *and* substantial maintenance are an abuse of discretion in a case such as this, when the parties are near retirement age and the marital estate is large enough to leave both parties comfortable in retirement if it is divided more equally. This court should reverse and remand to the trial court to reconsider its maintenance and property awards.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Findings of Fact (FF) 2, 6, 8-13, 15, and 17 (CP 248-56)

2. The trial court in entering Conclusions of Law (CL) 3, 4, 6, 8, and 9. (CP 256-59)

The portions of the findings and conclusions to which appellant assigns error are highlighted in the Findings of Fact and Conclusions of Law at Trial, CP 248-65, attached as Appendix A to this brief.

3. The trial court erred in making its maintenance award and property distribution in the Decree of Dissolution. (CP 266-78)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does a 60/40 community property division in favor of the wife put the parties in “roughly equal” financial positions when

the husband will retire in less than three years, the wife's award consists of virtually all the cash and retirement accounts that the parties accumulated during the marriage, and the husband's award is largely illiquid?

2. Did the trial court err by awarding the wife a \$1.7 million "equalizing" judgment that could only be paid by invading the husband's separate property?

3. Did the trial court err by including property acquired by the husband after the parties separated as part of its 60/40 award of community property?

4. Did the trial court err by valuing and assigning as an asset the husband's Alaska surgical practice, even though Alaska law prohibits such a distribution?

5. Did the trial court err by awarding the wife spousal maintenance of \$1 million for the next three years, when the husband would retire in less than three years and the wife was already awarded \$3.5 million more than the husband, including the vast majority of the parties' retirement accounts?

6. Should this court award the husband his attorney fees based on his need and the wife's ability to pay?

IV. STATEMENT OF THE CASE

A. Background.

Appellant Dr. Kim B. Wright, born February 1, 1953, and respondent Mary Wright, born April 10, 1952, were married on June 14, 1980. (CP 3-4; RP 44, 46) They have eight children, now 17 to 31 years old. (RP 46, 47, 49, 50, 55, 57, 65) The parties physically separated in November 2007 when Dr. Wright moved from the family home on Mercer Island to Alaska. (RP 378, 763) Despite their physical separation and “parallel lives” thereafter, the trial court found that the parties legally separated on April 26, 2011, when Ms. Wright filed a petition to dissolve the parties’ marriage. (CP 3; Finding of Fact (FF) 2, CP 249; RP 767) After a six-day trial, the parties’ marriage was dissolved on July 31, 2012. (CP 266)

B. **The Husband Is A Neurosurgeon. The Wife Is Trained As A Nurse But Has Not Worked Outside The Home Since 1985. The Parties Have Eight Children, All But One Of Whom Are Adults.**

The parties met in the late 1970’s in California, where Ms. Wright was working as a nurse at the San Diego Burn Center and Dr. Wright was in medical school at the University of California San Diego. (RP 45) They married on June 14, 1980, after Dr. Wright completed his one-year surgical internship. (RP 45-46)

Shortly after the wedding, the parties moved to Seattle for Dr. Wright's five-year neurosurgery residency. (RP 60) The parties' three oldest daughters were born here in 1981, 1983, and 1985. (RP 61-62) Ms. Wright worked at the Puget Sound Blood Center except for brief maternity leaves when each child was born. (RP 61-63) After Dr. Wright's residency ended in July 1985, the family moved to Colorado, where Dr. Wright joined a private practice as a neurosurgeon. (RP 62-63) Once the family moved to Colorado, Ms. Wright stopped working outside the home. (RP 62-63) While in Colorado, the parties' twins, a boy and a girl, were born in 1987. (RP 63) The family returned to Washington State in March 1989. (RP 63) After moving to Seattle, three more daughters were born in 1989, 1993, and 1995. (RP 64-65)

In 1993, the parties purchased an 8,400-square foot home on 30,000-square feet of waterfront on "the more desirable west side of [Mercer] Island." (FF 14, CP 255; RP 212, 226-27, 502) Ms. Wright's appraiser valued the home at \$4.1 million. (RP 210) Dr. Wright's appraiser valued the home at \$4.9 million, although Dr. Wright believed it was worth much more. (RP 426, 805) The trial court found that "if the real estate market were as robust as it was five years ago, the property would sell for a price in the

neighborhood of its assessed value of over \$5 million.” (FF 14, CP 255) “However, with the market having fallen and financing considerably harder to obtain,” the trial court valued the home at \$4.5 million. (FF 14, CP 255)

The parties also own a condominium in Bellevue, where their third daughter, age 27, lives. (RP 49-50, 511) The parties stipulated to the condo’s value of \$220,000. (RP 511; Ex. 31)

C. The Husband Had A Very Busy Private Practice In Seattle For 13 Years. After Two Lawsuits Prohibitively Increased The Cost Of His Malpractice Insurance, The Husband Became An Employee Of A Renton Hospital.

In 1989, Dr. Wright started a private practice in Seattle, with privileges at Providence, Swedish, and Highline hospitals. (RP 779-80) The years 1989 through 2002 were a period of high stress for Dr. Wright, as his practice was “very demanding.” (RP 780) Dr. Wright spent “a lot of road hours, a lot of time just seeing patients and doing surgeries and doing consults and driving all over town.” (RP 780-81) Dr. Wright sought “alternative income” so that he could cut back his private practice or “quit altogether.” (RP 781) But his financial adviser advised him that “you need to concentrate on what you know best.” (RP 781)

Dr. Wright's private practice took a hit in the late 1990s, when Paul Luvera filed "two devastating lawsuits" against him. (RP 781, 78) The plaintiffs sought damages of \$20 million each. (RP 783) Dr. Wright ended up settling both cases, but his medical malpractice insurance providers dropped him. (RP 784) Without malpractice insurance, Dr. Wright could not work at any of the hospitals where he had privileges. (RP 785) To stay in business, Dr. Wright took out a "very expensive" "high risk" policy that cost \$120,000 the first year, and \$200,000 the following year. (RP 785) The "killer," however, was "tail" insurance that cost \$500,000. (RP 785-86) Dr. Wright testified that as a result of the escalating cost of malpractice insurance he started to look for alternative places to practice – "no fault insurance" states or institutions that would cover his insurance. (RP 786, 788)

Dr. Wright was able to stay in Washington when he accepted an offer from Valley Medical Center in Renton for a five-year contract as an employee neurosurgeon. (RP 786-87) Valley Medical was self-insured, and Dr. Wright as an employee was not required to obtain individual malpractice insurance. (RP 786) Valley Medical also agreed to pay the \$500,000 cost of Dr. Wright's

“tail.” (RP 786) Dr. Wright closed his private practice and started working for Valley Medical on November 1, 2002. (RP 787)

As he had in his private practice, Dr. Wright continued to perform approximately 600 surgeries a year as an employee of Valley Medical. (RP 790) While Dr. Wright’s demanding practice provided the family with employment income of \$1.3 and \$1.6 million annually (Exs. 221-24),¹ he felt like a “mule” pulling both the “plow” and the “party train.” (RP 953) Dr. Wright testified, “I keep pulling the plow and the party wagon so the family can fly around the world in a private jet and vacation on one of the largest yachts in the world² while I’m strapped in the harness continuing to work.” (RP 953-54)

Dr. Wright was concerned that the family had become afflicted with “excessive consumption” as a result of their lifestyle on Mercer Island. (RP 621-22) Dr. Wright wanted his children to have different experiences – “experience something less than what they’re experiencing on Mercer Island.” (RP 622) Over the years, and as the children got older, Dr. Wright suggested to Ms. Wright

¹ The average annual income for a neurosurgeon is \$1 to \$1.5 million. (FF 8, CP 252)

² Ms. Wright is good friends with Paul Allen’s sister Jody, a near neighbor on Mercer Island. (RP 601) Family members have vacationed with Ms. Allen to Tahiti on at least two occasions, using her private jet and staying on Paul Allen’s yacht. (RP 603)

that the parties sell their expensive Mercer Island home to reduce expenses, so that he could work less.³ (RP 592-95) Nothing ever came of these discussions to sell the home, so Dr. Wright continued with his stressful surgical practice. (RP 592-95)

The trial court described Dr. Wright as having “something of a sad ‘everyman’ quality.” (FF 6, CP 250) “He can marvel at the works of Van Gogh, worry about his children contracting ‘influenza’ on Mercer Island, appreciate the challenge of a new frontier and observe with a sigh ‘You get up and go to work every day and the next thing you know, your life has slipped by.’ And yet, rather than directly confronting difficult issues, he has tended to fall back into the comfortably familiar role he describes as ‘the old mule in the harness, pulling the party wagon.’” (FF 6, CP 250-51)

D. The Husband, “Burned Out” at Age 54, Hoped He Could Partially Retire By Relocating to Alaska, Which Has A Higher Reimbursement Rate for Surgeries. The Wife Refused To Accompany The Husband To Alaska.

By 2007, Dr. Wright, then age 54, was “burned out.” (RP 792) As his contract with Valley Medical was ending, Dr. Wright was recruited by Alaska Native Medical Center, a hospital in

³ Even though the home was owned free and clear at the time of trial, maintaining the residence cost over \$10,500 per month, including the salaries of a maid and groundsman. (Exs. 53, 55; RP 970)

Anchorage, Alaska. (RP 789) Because it is difficult to recruit and retain neurosurgeons in Alaska, the reimbursement rate is six times greater than in Washington. (RP 666, 745, 789-90) The prospect of practicing in Alaska offered Dr. Wright the possibility of a “highly-paid earlier retirement.” (RP 790, 791)

After deciding to accept the offer from Alaska Native Medical Center, Dr. Wright asked Ms. Wright to join him. (RP 761) By then, only the youngest three children, then ages 18, 14, and 12, were at home; the five older children were either in or had graduated from college. (RP 61-65, 375-76) Ms. Wright testified that Dr. Wright did not “require” her to relocate with him to Alaska, so she chose not to. (RP 376, 590, 761)

Dr. Wright testified that once Ms. Wright declined to relocate with him to Alaska, he viewed the parties as separated. (RP 763) Dr. Wright did not pursue a divorce at the time because “it was just easier to do nothing.” (RP 768) Ms. Wright is Roman Catholic, “so divorce wasn’t something she wanted to do.” (RP 769) Dr. Wright chose not to “force the issue.” (RP 769)

E. The Parties Lived “Parallel Lives” After The Husband Moved To Alaska. Despite His Initial Intention To Work Less, The Husband Continued To Work Fulltime To Pay His Own Expenses And Maintain The Family’s Lifestyle On Mercer Island.

With Ms. Wright and the family remaining on Mercer Island, Dr. Wright soon realized that he could not support both the family and his own expenses while working less than full time at Alaska Native. (RP 794) Dr. Wright accepted an invitation to join Alaska Neuroscience Associates (ANA), a private practice with another neurosurgeon, in addition to his part-time work at Alaska Native. (RP 792)

ANA is an “office sharing arrangement;” the partners do not pool income and instead “eat what you kill.” (RP 73, 985) By the time of trial, a third physician was buying into ANA as a partner, at a cost of \$10,000. (RP 696) ANA recruited the incoming partner to avoid having her join a competing practice, which would cut into ANA’s income, and for additional call coverage. (RP 744)

Despite his best intentions to take a “break” when he began practicing in Alaska, Dr. Wright was once again working full-time in a high stress practice in order to support the family’s lifestyle. (RP 794) Ms. Wright had historically managed the finances – or as Dr. Wright described, “my paycheck was sent home, and Mary spent it.”

(RP 764) Once settled in Alaska, Dr. Wright took over his finances.

(RP 764) Dr. Wright tried to put Ms. Wright on a budget, sending her \$20,000 a month, and additional amounts when requested by Ms. Wright, for taxes or the children's tuition. (RP 764-65)

In response to Dr. Wright's attempt to put her on budget, Ms. Wright testified that she "didn't feel a terrible need to have to cut back, actually. Did I – maybe I should have, but I didn't feel that way." (RP 575) Ms. Wright also declined Dr. Wright's suggestion when the two youngest children were in high school to volunteer or seek outside employment, so she could feel "what it was like to pull the plow" or to have some "skin in the game." (RP 953, 970)

With the exception of sending money to Ms. Wright on Mercer Island, Dr. Wright kept his finances separate in Alaska, opening bank accounts and investing and purchasing real property in his name only. (RP 764) Among other real properties in Alaska, Dr. Wright in February 2010 purchased his residence at 3608 North Point Drive, with a stipulated value of \$1.5 million, and two rental properties, with stipulated values of \$800,000 and \$330,000. (RP 816-17, 1001; Ex. 30) Dr. Wright also owns a building in Wasilla, Alaska, which he uses as a satellite office, with a

stipulated value of \$290,000, and an airplane hangar, with a stipulated value of \$190,920. (RP 799; Ex. 30)

Dr. Wright formed Moriarty Enterprises, LLC, which in November 2010 acquired a 14-acre farm outside Wasilla, with a stipulated value of \$1.150 million. (RP 818, 1003; Ex. 30) Moriarty Enterprises also owns two airplane hangars, with a stipulated value of \$700,000. (RP 823; Ex. 30)

Dr. Wright also formed Southside LLC with a friend, Dick Armstrong, to purchase the “Borders” building in Anchorage for \$4.234 million in July 2011, after the wife filed for dissolution. (RP 824-25; Ex. 296) Mr. Armstrong, who is a 1% member of the LLC, made the down payment of \$1.057 million, and the LLC financed the remaining \$3.087 million of the purchase price. (RP 982; Ex. 295, 299, 302) Dr. Wright must repay Mr. Armstrong for the down payment; the loan is secured by a deed of trust on the Wasilla farm. (RP 982; Ex. 306, 307) According to Dr. Wright, he was required to repay Mr. Armstrong by July 2012 or risk losing the encumbered property. (RP 827-28)⁴ The one-year \$3.087 million bank loan also was to be repaid or refinanced by July 2012. (RP 826; Ex. 298)

⁴ The promissory note states that it is payable in July 2016, but Dr. Wright and Mr. Armstrong separately agreed that Dr. Wright would pay the note by July 2012. (See RP 827, 982; Ex. 307)

Dr. Wright expressed concern that if he were not awarded adequate assets, the bank would deny a refinance. (RP 827)

F. With Health Issues, The Loss of Private Patients, and Two Pending Malpractice Suits, After 30 Years In Practice The Husband Hoped To Retire Soon.

As a result of the high reimbursement rates in Alaska, Dr. Wright's surgical practice in Alaska was lucrative. His income went from \$1.5 million in 2007 at Valley Medical to \$5.5 million in 2009. (RP 655) Neal Beaton, who had been hired to value Dr. Wright's practice, described this increase as "very substantial" and "very unusual." (RP 652, 656) Beaton testified that Dr. Wright's high income was unrelated to his skills or reputation as a surgeon, but due entirely to the high reimbursement rates in Alaska. (RP 666-69) The trial court agreed, finding that "the dramatic increase" in Dr. Wright's income "is attributable to the medical reimbursement rates utilized in Alaska by both private insurers and government entities such as worker's compensation, Medicare, Medicaid and Tricare." (FF 8, CP 252)

At trial, the parties disputed the value of Dr. Wright's interest in his surgical practice, but it was undisputed that it was unlikely he could ever sell the practice. (RP 158, 878) Beaton testified that ANA's tangible net assets, which consisted almost

entirely of accounts receivables less than six months old, were worth \$1.048 million, and valued Dr. Wright's goodwill at \$366,000. (RP 194-95, 611, 699, 736) Ms. Wright's expert, Kevin Grambush, testified that ANA's net tangible assets were worth \$1.105 million, and valued Dr. Wright's goodwill at \$7.295 million. (RP 71) The \$57,000 difference in the value of the net tangible assets was Grambush's inclusion of undistributed cash. (RP 681) The difference in the experts' valuation of goodwill was that Beaton "normalized" the income from the practice, removed the "aberrational component" of Alaska's high reimbursement rates, and assumed that Dr. Wright would retire by 2014, at age 61. (RP 682-88) Grambush calculated Dr. Wright's goodwill using the Alaska reimbursement rate and assumed that Dr. Wright would retire in 2018, at age 65. (RP 109, 115-16)

The trial court found Beaton's analysis "more persuasive." (FF 13, CP 254) The trial court found that "consistent with the [] nature of goodwill, he appropriately avoids making computations that would attribute to goodwill the aberrational impact of Alaska's reimbursement rates." (FF 13, 254-55) Even though the trial court acknowledged that Dr. Wright's goodwill was "not a saleable asset," it distributed it to him at a value of \$366,000. (FF 9, CP 252; CP

260) The trial court found that the net value of ANA, including goodwill, was \$1,414,206. (FF 13, CP 255)

Changes to Dr. Wright's "payer mix" caused a decline in his income starting in 2011. (RP 130, 673-74, 906) Dr. Wright's private pay cases are being replaced by Tricare cases, military patients with reimbursement rates substantially lower than private pay patients. (RP 130, 674, 906) Dr. Wright's Tricare cases have increased from 20% to 36% of his practice. (RP 131) Dr. Wright also lost a substantial referral base of private patients in May 2011 when he had a falling-out with the physicians of the Alaska Spine Institute. (RP 673-74) And Dr. Wright lost private patients in Soldotna, Alaska, where he had a satellite office that generated 40% of his practice, when the hospital there hired its own surgeon in 2011. (RP 798-99) Dr. Wright testified this "took out my practice by the knees." (RP 799)

Dr. Wright had been a neurosurgeon for over thirty years by the time of trial. (RP 46) He had hoped to retire by 2014, when he would be 61 years old, if not sooner. (RP 688, 880) Dr. Wright testified that it was likely that he would have to retire sooner rather than later because of health issues that impacted his practice. In particular, Dr. Wright had injured his right wrist – his operating

hand – in 2006. (RP 672, 880-81) It had never fully healed, and started causing problems for him in 2010, altering the way Dr. Wright could perform surgeries. (RP 880-81) While this “stretch[ed] out [his] surgery career,” Dr. Wright acknowledged that it also placed his “liability insurance at greater risk.” (RP 881)

This was of particular concern for Dr. Wright in light of the two malpractice suits filed against him in the late 1990’s, and two additional malpractice suits that were pending during the dissolution action. (RP 672, 892-93) Dr. Wright had just come from defending one of the malpractice actions in a three-week jury trial right before the dissolution trial. (RP 892-93) The malpractice trial resulted in a defense verdict, but it was “incredibly stressful.” (RP 672, 892) As Dr. Wright testified: “you spend nearly three weeks having somebody point their fingers at you [] mak[ing] all these false claims that just were completely untrue. And you’re just sitting there at the mercy of the jury hoping that the jury understands the complexity of the situation knowing that if the jury doesn’t understand they can end your career.” (RP 892)

The other malpractice action was still pending at the time of trial. (RP 893) Dr. Wright described a malpractice lawsuit as a “threat and [] pall hanging over your head [], another problem. []

And it's just your just under constant threat, constant risk of losing your career over some case that you couldn't do anything differently with." (RP 891) Even with a defense verdict, Dr. Wright testified that "every lawsuit [] follows you," noting the duty to report every suit "for the rest of your life. Every time you apply for hospital privileges, insurance, you name it, it follows you." (RP 893-94)

In addition to his wrist injury, Dr. Wright had just been diagnosed with cataracts. (RP 888) Dr. Wright did not yet need to have his lenses replaced, but once he did, it would significantly impact his ability to perform surgery. (RP 888-89) "[T]he problem is [] when you're doing surgery, especially microsurgery, you need a depth of field. You need [] to be able to look near and far. And with cataracts, you really lose your ability to focus, you know, and accommodate near and far. . . . [w]ith an artificial lens So I don't know how I could keep up doing this type of intricate surgery when I lose my depth of field." (RP 889)

In addition to these injuries and the emotional stress of looming malpractice claims, Dr. Wright testified that the surgical practice in and of itself was physically stressful. (RP 889) Dr. Wright's day starts at 5:30 a.m. and may not conclude until 7:00 to 9:00 p.m. (RP 890) Dr. Wright may have to wake up in the middle

of the night to go to the hospital when he is on call. (RP 890) Dr. Wright's practice is "physically, mentally, and emotionally exhausting." (RP 891)

The trial court acknowledged that Dr. Wright's "wrist and vision problems will limit or curtail his productivity," and that "his private payor patients are steadily diminishing." (FF 12, CP 254) The trial court purported to give "some weight" to Dr. Wright's "claim that his future earning capacity will be limited," but found that "Dr. Wright will continue his hard work and high income for several more years." (FF 12, CP 254) Somewhat inconsistently, the trial court then found that "Dr. Wright is most likely to continue working at capacity until early 2015 when he turns 62" – only 2 ½ years after trial – and that "with insurance companies and the government tightening up on medical reimbursements in the future, it is likely that Dr. Wright's income will decrease a bit from the high water mark of the past few years but it will remain ample." (FF 12, CP 254) The trial court found Dr. Wright's "anticipated gross annual income to be \$4,000,000 or a monthly net income of roughly \$180,000." (FF 12, CP 254)

G. Over Three Years After The Husband Relocated To Alaska, The Wife Filed For Divorce.

While working in a stressful and busy practice in Alaska, Dr. Wright continued to frequently visit Seattle. (RP 765) When he visited, he stayed at the Mercer Island home, “because that’s where my kids were.” (RP 766) Although Dr. Wright stayed in Ms. Wright’s bedroom during these visits, the evidence was undisputed that the parties were never “physical.” (RP 766) Between 2007 and 2010, Dr. Wright and Ms. Wright lived “parallel lives.” (RP 767) Although divorce was discussed, the parties did not act on it because of the children, and because Dr. Wright testified he was “too busy.” (RP 767, 769)

Dr. Wright believed the parties were separated when Ms. Wright refused to relocate with him to Alaska. (RP 763) He started a new relationship in Alaska. (RP 767) Ms. Wright admitted that Dr. Wright told her about the woman, but denied that she knew they were in a relationship. (RP 398-99) In fall 2010, Dr. Wright told Ms. Wright that his girlfriend was pregnant. (RP 398-99, 771) Dr. Wright returned to Mercer Island for Thanksgiving and told the rest of the family by reading them a letter he had written. (RP 401-02, 771, 1032-33; Ex. 18) Thereafter, Dr. Wright stopped staying at the Mercer Island home during his visits to Washington. (RP 771)

Also in fall 2010, Ms. Wright consulted with Mabry DeBuys, a divorce attorney. (RP 770-71) But she testified that divorce was still not a “definite thing” for her. (RP 404)

Dr. Wright’s youngest child was born January 8, 2011. (RP 404) On April 26, 2011, more than three years after the parties began living separate and apart and six months after Dr. Wright told her he was having a child with another woman, Ms. Wright filed a petition to dissolve the parties’ marriage in King County, Washington. (CP 3) Dr. Wright was ordered to pay Ms. Wright over \$38,000 per month as temporary “non-taxable family support.” (CP 297)

H. The Trial Court Ordered The Husband To Pay Over \$1 Million In Maintenance Over The Next Three Years, And Awarded The Wife 60% Of The Community Estate, Including \$1.7 Million In Cash Transfer Payments.

The parties appeared before King County Superior Court Judge William Downing for a six-day trial commencing on May 29, 2012. The parties had stipulated to a parenting plan for their youngest child, then 17. (RP 4-5) They also stipulated to the values of most assets. (See Ex. 30, 31) The issues for trial were property distribution, maintenance, and child support.

Despite Dr. Wright's relocation to Alaska in November 2007, and the trial court's acknowledgement that after Dr. Wright disclosed his girlfriend's pregnancy the "marriage (or 'whatever') stumbled along," the trial court found the date of separation was April 26, 2011, when Ms. Wright filed her petition for dissolution. (FF 2, CP 249; FF 6, CP 251) As a result, the trial court concluded that much of the property that Dr. Wright had acquired solely in his name after he moved to Alaska to be community property.

The trial court found that the parties' community estate was worth \$17.184 million. (CP 260-64) The trial court found that the husband had less than \$1 million in separate property assets, all acquired after the date of separation. (*See* CP 268, 269) The trial court awarded the wife what it calculated as 59.5% of the community estate, over \$10.226 million, including the vast majority of the parties' cash accounts, most of the retirement and stock accounts, and a \$1.7 million judgment against the husband.⁵ The trial court awarded the husband all of the Alaska real property, his

⁵ The first payment of \$200,000 was due "at the time of entry of Decree of Dissolution," and the remaining three payments of \$500,000 on January 15 of the next three years, starting in 2013 and concluding in 2015. The judgment bears interest at 6% per annum from August 1, 2012 until paid in full. (CP 273-74) The husband was ordered to pay to the wife the accrued interest on the cash payments, approximately \$7,500 per month, on a monthly basis. (CP 274, 291)

surgical practice, and other business investments and illiquid assets:

	<u>Wife</u>	<u>Husband</u>
Real Property		
Mercer Island	\$ 4,500,000	
Bellevue	\$ 220,000	
Colorado	\$ 137,500	
Anchorage (3608)		\$1,500,000
Anchorage (4034)		\$ 800,000
Anchorage condo		\$ 330,000
Anchorage hanger		\$ 190,290
Business		
AK Neuroscience		\$ 1,414,206
AK Spine Surgery		\$ 91,874
Moriarity		\$ 2,219,617
Development		\$ 91,397
Southside		\$ 829,762
Development	\$ 101,977	
Wright Bros.		
Madrona Venture		
Stocks	\$ 1,311,734	\$ 775
Retirement		
ANA CB	\$ 159,544	\$ 159,544
ANA PS		\$ 28,791
Alaska Native		\$ 50,184
IRAs	\$ 1,068,142	zero
Valley Medical		\$ 145,443
Bank Accounts	\$ 733,686	\$ 110,159
Personal Property		
Jewelry; Vehicles; Boat/Planes; Tax Refunds	\$ 294,251	\$ 695,000
Subtotal	\$ 8,526,834	\$ 8,657,042
Cash Transfer Payment	\$ 1,700,000	(\$ 1,700,000)
Interest on judgment	\$ 131,425	(\$ 131,425)

	<u>Wife</u>	<u>Husband</u>
TOTAL	\$10,358,259	\$6,825,617
	60.3%	39.7%
(CP 260-64)		

In awarding the wife 50% (\$3.5 million) more, in assets that were liquid and “better” than those awarded to the husband, the trial court stated that it was “guided by RCW 26.09.080” and an “oft-cited 1982 Bar News article” that the court stated suggests that “in dissolving a long range marriage such as this one, the court’s goal should be to place the parties in roughly equal financial positions for the rest of their lives.” (Conclusion of Law (CL) 4, CP 257)

In addition to its disproportionate award of property and cash, the trial court awarded the wife spousal maintenance of \$30,000 a month for three years. (CP 258) In making its maintenance award, the trial court stated that it was “keyed” to the “wife’s needs in connection with her retention of the family home to the benefit of the couples’ eight children” (CL 9, CP 258) – all but one of whom were adults. The trial court ordered the husband to pay \$1,602 in child support, and to pay 87% of the minor child’s extraordinary expenses and of the two youngest children’s post-secondary support expenses. (CP 282-83)

Dr. Wright appeals. (CP 193) Ms. Wright cross-appeals. (CP 244)

V. ARGUMENT

A. Standard Of Review.

This court reviews both maintenance and property awards for abuse of discretion. *Marriage of Mathews*, 70 Wn. App. 116, 122, 123, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable if “it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Littlefield*, 133 Wn.2d at 47. It is based on untenable grounds if the factual findings are unsupported by the record. *Littlefield*, 133 Wn.2d at 47. It is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Littlefield*, 133 Wn.2d at 47.

B. Giving The Wife 50% More of The Community Property Was Not Warranted When The Parties Are At Retirement Age And The Disproportionate Award Could Only Be Effected With Property Earned By the Husband After Divorce.

1. Giving The Wife Nearly All The Liquid Assets And A Large Money Judgment Against The Husband's Illiquid Award Does Not Place Parties Who Are Nearing Retirement In "Roughly Equal Financial Positions."

The trial court was purportedly "guided" by Judge Winsor's "suggestion" that "in dissolving a long range marriage such as this one, the court's goal should be to place the parties in roughly equal financial positions for the rest of their lives." (CL 4, CP 257)⁶ First, nothing in RCW 26.090.080, which governs property distributions on dissolution of marriage, requires the parties to be placed in "roughly equal financial positions" at the end of a long-term marriage. Instead, under the statute, the trial court's goal is to make a distribution of property that is just and equitable after consideration of all relevant factors, including but not limited to:

1. The nature and extent of the community property;
2. The nature and extent of the separate property;
3. The duration of the marriage; and

⁶ Winsor, Robert, "Guidelines for the Exercise of Judicial Discretion," Washington State Bar News (January 1982). The article is not available online, and has never been cited in a published decision of the Washington appellate courts. For the court's convenience, a copy of the article is attached as Appendix B.

4. The economic circumstances of each spouse at the time the division of property is to become effective.

RCW 26.09.080. Second, to the extent “roughly equal financial positions” is the court’s goal in dividing the marital estate at the end of a long-term marriage, a property distribution that awards the wife 50% more property, including nearly all of the parties’ retirement accounts and cash, and requires the husband to pay a \$1.7 million “equalizing” judgment to the wife less than three years before retirement does not put the parties in “roughly equal financial positions.” Instead, it leaves the wife in a far superior economic position than the husband.

Judge Winsor’s suggestion that parties be placed in “roughly equal financial positions” at the end of a long-term marriage was not intended to force one spouse to bear the continued burden of supporting the other after their marital ties are severed. Instead, Judge Winsor contemplated equitably dividing the property, *both* parties working to their “reasonable capacities,” and, if one spouse has a greater economic earning capacity, awarding the other spouse maintenance *or* more property, but not both:

The goal should be to look forward and to seek to place the spouses in an economic position where, if they both work to the reasonable limits of their respective earning capacities, and manage the properties awarded to them reasonably, they can be

expected to be in roughly equal financial positions for the rest of their lives. Long term maintenance, sometimes permanent, is presumably likely to be used unless the properties accumulated are quite substantial, so that a lopsided award of property would permit balancing of the positions without (much) maintenance.

Winsor, Robert, "Guidelines for the Exercise of Judicial Discretion," Washington State Bar News at 16 (January 1982).

The justification for a disproportionate award of property is that the party with the higher earning capacity will continue to work for several more years, allowing him or her to "catch up" to the other spouse with the lesser earning capacity and balance out their financial situations. For example, in the case on which Judge Winsor relied for his theory of using a disproportionate division of property to put parties in "roughly equal financial positions," *Marriage of Rink*, 18 Wn. App. 549, 571 P.2d 210 (1977), the parties were still relatively young and had several working years ahead of them after their 24-year marriage ended. The wife, age 45, was entering the workforce after being absent for the previous 15 to 17 years. The husband, age 47, was a truck driver. Recognizing that the husband's higher earning capacity would serve him as he continued working after the dissolution, the trial court awarded the wife two-thirds of the marital estate, but only limited maintenance

(12 months at \$200 per month) to “balance” their situations. *Rink*, 18 Wn. App. at 551.

More recently, in a case frequently cited in the lower courts to support the goal of placing the parties in roughly equal financial positions, *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008), the trial court contemplated that the wife would live off the assets awarded to her, while the husband would have income from which to “grow” his retirement without invading the property awarded to him. Division One therefore approved a disproportionate property award to the wife, who was six years older than the husband and in ill health, when the trial court found that the husband, age 54, still had at least 7 years of employment to “catch up” to the wife. *Rockwell*, 141 Wn. App. at 248-49, ¶¶ 23-24.

Here, however, the parties were of an age where the trial court assumed the wife, age 60, would not work, and that the husband, age 59, would retire in 2 ½ years. (FF 4, CP 250; FF 12, CP 254) Given this, the trial court was wrong when it concluded that a temporary “relatively mild disparity in the division of assets” “will disappear as quickly as the memory of a harness once one has chosen to throw it off or redefine it.” (CL 9, CP 259) First, the

disparity was not “relatively mild.” The trial court awarded 50% more property (\$3.5 million) to the wife than the husband, including virtually all the parties’ retirement accounts and liquid assets. Second, the obligations the court imposed on the husband, including a \$1.7 million judgment and \$1 million in maintenance, mean that he will never be able to overcome the disparity in the division of assets, be it considered “mild” or otherwise. Instead, the trial court’s decision tightened the “harness” on the husband at a time when the trial court found he should be able to retire.

As a result of the trial court’s decision, the wife is not in “roughly equal financial position” to the husband – she is in a far better position both financially and equitably. She does not have to work (nor has she in the last 27 years), she has an income stream over the next three years of nearly \$3 million, and she leaves the marriage with virtually all of the “nest egg” in cash and retirement accounts that the parties accumulated together during their marriage. The only way for the husband to “catch up” is to continue to work 14 to 16-hour days, doing work that is both physically and mentally tasking. This result is neither just nor equitable.

All that the husband ever sought is a life similar to the one the wife has long had, without having to wait five or ten more years:

And I guess, you know, the question I have is when is it going to be my time to be able to wake up in the morning to a beautiful waterfront home, come downstairs, make a big pot of coffee, open up the newspaper, and turn on [the radio].

(RP 954) The trial court's decision deprives him of that. At age 59, the husband is yoked to a "lopsided" property award and a large maintenance obligation that together condemn him to funding the marital estate with post-dissolution income.

2. The Trial Court Improperly Invaded Separate Property By Awarding The Wife A Judgment That Will Necessarily Be Paid From The Husband's Post-Dissolution Earnings.

The trial court's award of a \$1.7 million "equalizing" judgment is essentially an invasion of the husband's separate property – his post-dissolution earnings. Given the nature of the parties' assets, and the trial court's division of them, there was no other place from which this judgment could be paid. As such, it was an abuse of discretion, because the community property awarded to the wife was more than adequate to meet her needs. *Marriage of Holm*, 27 Wn.2d 456, 465, 178 P.2d 725 (1947) (reversing award of husband's separate property to the wife; "[t]his is not a case where, in order to make adequate provision for the necessitous condition of the wife, the court is constrained to take from the husband his separate property."); RCW 26.16.140 (when spouses are living

separate and apart, their respective earnings shall be the separate property of each).

In *Holm*, the trial court awarded half of the entire marital estate, including a small portion of the husband's separate property, to the wife. The Supreme Court reversed, stating that such an award "allowed [the husband] nothing for his original, or separate, assets." *Holm*, 27 Wn.2d at 464. The Court held that an award of the husband's separate property to the wife was unnecessary because half of the community property would "amply provide" for the wife, especially since the husband would bear a greater share of the expense to support and educate the parties' children. *Holm*, 27 Wn.2d at 465-66.

Here, even without the \$1.7 million "equalizing" judgment, the wife received more than \$8.5 million in assets, including over \$1.3 million in stocks, \$1.227 million in retirement accounts, and \$733,386 in cash and savings. (CP 260-64) This award was more than adequate to meet the wife's needs and lifestyle without invading the husband's separate property.

"Washington courts refrain from awarding separate property of one spouse to the other if a just and equitable division is possible without doing so." *Stokes v. Polley*, 145 Wn.2d 341, 347, 37 P.3d

1211 (2001). Before invading the husband's post-dissolution separate earnings, the trial court should have considered not just the *percentage* of the award to the wife,⁷ but the "nature" of those assets. RCW 26.09.090 (in making its property division, trial court must consider the nature and extent of community property). The wife received far more tangible and liquid assets, "assets that she can eat, sell, or spend." (RP 866) Meanwhile, the husband's award was largely illiquid business and real property interests.

The "right of the spouses in their separate property is as sacred as is their right in their community property." *Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009) (*quoting Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)). Where, as here, the community assets awarded to the wife are sufficient to meet her lifestyle and expenses, a \$1.7 million judgment to be necessarily paid from the husband's separate property earnings was not warranted.

⁷ The trial courts seem to believe that any property division that does not exceed 60/40 is immune from appellate review. The award here, calculated by the trial court at 59.5/40.5, reflects that reasoning.

C. The Property Division Was Even More Disparate Than The Trial Court Recognized, As The Husband's Award Included An "Unsalable" Asset, Was Largely Earned Post Separation, And He Remains Solely Responsible For Any Community Malpractice Liability.

The trial court's purported 60/40 community property division was even more egregious because it in effect awarded the wife virtually all of the property that the parties amassed during their marriage, and left the husband only those assets he had acquired in Alaska – including separate accounts receivable and goodwill that the trial court acknowledged was “not a saleable asset.” (FF 9, CP 252) The trial court also failed to properly address the ongoing risk of malpractice liability. As set out in Appendix C, the husband in fact received \$3.449 million less than the trial court intended in the community property division, and the trial court's division was 75.4/24.6 in favor of the wife. In short, the wife received three times the community property awarded the husband. Had the trial court properly considered these assets and liabilities for what they were, it would have recognized that its award was far from the “60/40” community property division it purported to make.

1. The Trial Court Erred In Characterizing As Community Property Accounts Receivable The Husband Earned After The Wife Filed For Dissolution.

The trial court erred by including \$1.048 million in net “tangible” assets from the husband’s surgical practice as part of its 60/40 community property division because those assets were comprised almost entirely of accounts receivable for services performed by the husband long after the wife filed for dissolution. (Ex. 202; RP 194-95, 611) RCW 26.16.140 (“When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each.”) By including this portion of the husband’s medical practice in its 60/40 division of community property, the trial court in fact awarded the wife \$628,800 more than she would have received had the net tangible assets of the practice been properly characterized as Dr. Wright’s separate property.

2. The Trial Court Erred In Refusing To Apply Alaska Law When Valuing And Distributing The “Goodwill” Of The Husband’s Surgical Practice.

The trial court properly found that the husband’s purported “goodwill” in his neurosurgery practice was “not a saleable asset.” (FF 9, CP 252) It then erred in awarding the husband goodwill as an asset in its 60/40 property division, because goodwill of a

business that cannot be marketed or sold cannot be considered in the distribution of property at the end of a marriage under Alaskan law. *Moffitt v. Moffitt*, 749 P.2d 343, 347 (Alaska 1988), *remanded on other grounds*, *Moffitt v. Moffitt*, 813 P.2d 674 (Alaska 1991); *See Miles v. Miles*, 816 P.2d 129, 131 (Alaska 1991) (“If no goodwill exists, or if it is unmarketable, then there should be no value considered when dividing the marital assets”); *Fortson v. Fortson*, 131 P.3d 451, 460 (Alaska 2006) (the wife’s dermatology “clinic’s unmarketability made it unnecessary to determine the value of the clinic’s goodwill”).

The law of Alaska is in “actual conflict” with the law of Washington, which allows goodwill to be distributed as an asset of the marital estate even if it is not a “readily marketable commodity.” *Marriage of Lukens*, 16 Wn. App. 481, 482, 558 P.2d 279 (1976), *rev. denied*, 88 Wn.2d 1011 (1977). “When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis.” *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997). “In a conflict of law case, the applicable law is decided by

determining which jurisdiction has the ‘most significant relationship’ to a given issue.” *Seizer*, 132 Wn.2d at 650.

Here, Alaska has the “most significant relationship” to a neurosurgery practice within its borders, and to whether goodwill is “distributed” to a citizen of Alaska. The policy underlying Alaska’s law prohibiting an award of an unsalable asset is that to do so “might restrict the liberty of the spouse who possesses that asset. That spouse might want to leave the business, change careers, go into public service, return to school, or any number of other possibilities that would reduce one’s income. However, that spouse will frequently be restricted from doing so because of large payments on a promissory note to the ex-spouse.” *Moffitt*, 749 P.2d at 347, fn. 3 (Alaska 1988).

In applying Washington law, the trial court stated that “Washington’s policy interests in consistency and in protecting the financial expectations of these parties are substantial and outweigh the speculative interest in not restricting the economic liberty in these unusual circumstances.” (FF 10, CP 253) But here, the parties had no “financial expectation” that any goodwill in the husband’s neurosurgery practice would be treated as an asset. The husband made an “average” neurosurgeon’s income in Washington,

and as an employee at Valley Medical since 2002 would have had no goodwill under Washington law. *Marriage of Hall*, 103 Wn.2d 236, 242, 692 P.2d 175 (1984). When the husband relocated to Alaska, it was for purposes of employment at Alaska Native Hospital, where he would again be an employee without goodwill even under Washington law.

The trial court should not have distributed the husband's purported goodwill to him as an asset. By including goodwill as part of its 60/40 division of community property, the trial court in fact awarded the wife \$219,600 more than she would have received had goodwill been properly excluded.

3. The Trial Court Erred In Characterizing Assets Acquired By The Husband In Alaska As Community Property In Its 60/40 Property Division.

“When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each.” RCW 26.16.140. Whether a husband and wife are living “separate and apart” turns on the “peculiar” facts of each case. *Marriage of Nuss*, 65 Wn. App. 334, 344, 828 P.2d 627 (1992) (citing *Togliatti v. Robertson*, 29 Wn.2d 844, 852, 190 P.2d 575 (1948)). But as a matter of law a marriage is “for all practical purposes ‘defunct,’” even though it has not been legally dissolved,

when the parties have ceased to have a “community” relationship, and retain only a skeletal “marital” relationship. *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 372-73, 754 P.2d 993 (1988) (citing Harry Cross, *The Community Property Law in Washington* 61 Wash. L. Rev. 13, 33 (1985)).

Here, the marriage was defunct long before the wife finally filed a petition to dissolve it. Even assuming the marriage was not defunct when the wife refused to join the husband when he relocated to Alaska in November 2007, it was certainly defunct in November 2010 after the husband disclosed to the wife that his girlfriend was pregnant. Thereafter, the parties told the children about the end of the marriage, and the wife did not allow the husband to stay in the Mercer Island home and consulted with divorce attorneys. (RP 401-02, 770-71, 1032-33)

A marriage is defunct when “the deserted spouse accepts the futility of hope for restoration of a normal marital relationship, or just acquiesces in the separation.” *Marriage of Short*, 125 Wn.2d 865, 871, 890 P.2d 12 (1995). The trial court thus erred in characterizing assets acquired by the husband after no later than November 2010 as community property. In addition to his earnings after November 2010, the Wasilla farm (\$1.150 million)

purchased in November 2010; an investment purchased with his brother in January 2011 (\$829,752); and certainly the “Borders” building (\$54,950) purchased in June 2011, were the husband’s separate property. By including these separate property assets as part of its 60/40 division of community property, the trial court in fact awarded the wife \$1.221 million more than she would have received had the assets been properly characterized.

4. The Trial Court’s Property Distribution Failed To Take Into Consideration The Pending Malpractice Lawsuit.

The trial court also erred in making the husband responsible for any liability associated with the medical malpractice action still pending at the time of dissolution, without also taking it into consideration in the property division. *See Dizard & Getty v. Damson*, 63 Wn.2d 526, 530, 387 P.2d 964 (1964). In *Dizard*, the husband was left responsible for the community business while the parties’ dissolution was pending. The community accumulated debts through the regular course of business for which creditors sought payment after the marriage was dissolved. The wife sought to avoid liability by claiming that the marriage was defunct when the liabilities were accumulated. The Supreme Court held that “it is inconceivable that respondent may authorize the husband to carry

on the community business, create a potential source of assets, ultimately share in these assets, and yet be immune from the claims of creditors who contribute to the accumulations, if any.” *Dizard*, 63 Wn.2d at 530. Similarly here, the wife benefitted immensely from the husband’s neurosurgery practice both during the marriage and in the dissolution. To the extent there is any future liability associated with the practice based on actions taken during the marriage, the trial court should have ordered the wife to share in that liability.

D. The Trial Court Erred In Awarding Three Years Of \$30,000 Monthly Maintenance When The Husband Would Retire In 2-1/2 Years And The Wife Was Awarded 50% More (\$3.5 Million) Of The Community Estate.

1. Maintenance Was Not Warranted When The Trial Court Awarded The Wife A Disproportionate Share Of The Community Property.

A court’s discretion in making an award of maintenance is “governed strongly by the need of one party and the ability of the other party to pay an award.” *Marriage of Foley*, 84 Wn. App. 839, 845-46, 930 P.2d 929 (1997). In assessing one spouse’s need and the other spouse’s ability to pay, RCW 26.09.090 commands the court to consider six factors, including the parties’ ages, standard of living, their financial obligations, the resources awarded each party,

and the time required for the party seeking maintenance to become self-supporting. The trial court's maintenance award in this case fails to properly consider these statutory factors:

Factor 1: The Wife's Property Award, Including Cash, Retirement, Stocks, And A \$ 1.7 Million Judgment, Was More Than Sufficient To Meet Her Reasonable Needs Without An Award Of Maintenance.

In making its maintenance award, the trial court must consider the property awarded to each spouse. *See Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997). Specifically, the statute requires that the trial court consider the "financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently." RCW 26.09.090(1)(a).

Here, the trial court awarded maintenance in excess of the wife's claimed monthly expenses even though it had awarded the wife 60% of the marital estate (an additional \$3.5 million – 50% more community property than the husband), including a judgment of \$1.7 million, and interest on that judgment of \$7,500 to be paid on a monthly basis. An "unequal distribution of property obviate[s] the need for spousal maintenance as it substantially improve[s] [the wife]'s financial position." *Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995). The wife's property award of more than

\$10 million in largely liquid assets, from which the trial court acknowledged she will earn monthly income of \$3,000 (CP 291), was more than adequate to meet her needs independently, making an award of maintenance unnecessary. RCW 26.09.090(1)(a); see *Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (no maintenance award in light of the property awarded the wife), *rev. denied*, 119 Wn.2d 1009 (1992).

Factor 2: Because The Property Award Was More Than Sufficient To Relieve The Wife From Seeking Future Employment, Rehabilitative Maintenance Was Not Necessary.

“Maintenance is not a matter of right.” *Morgan v. Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962). “It is not a policy of the law to give a wife a perpetual lien upon her divorced husband’s future earnings, which arise from his personal efforts.” *Morgan*, 59 Wn.2d at 642. “The purpose of spousal maintenance is to support a spouse until she is able to earn her own living or otherwise become self-supporting.” *Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). Here, the trial court’s property award alone allowed the wife to be self-supporting without an award of maintenance. If the wife chooses not to work, she can support herself with the retirement accounts of over \$1.2 million and the

income-producing assets awarded to her, and not from the husband's earnings after divorce.

Factor 3: The Wife Is Not Entitled To The Same (Or Better) Standard Of Living That She Enjoyed During The Marriage.

The wife was not “entitled to maintain her former standard of living as a matter of right.” *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973). Here, the trial court's maintenance award gives the wife not the same standard of living, but a better one. The wife's maintenance award of \$30,000, the \$3,000 monthly income from her property award, and the \$7,500 she receives in interest on her judgment exceeds her claimed monthly expenses. (Ex. 55)⁸ The wife should have a surplus of at least \$7,000 per month over the next three years – the equivalent of more than a quarter million dollars that she can add to her estate without modifying her expensive lifestyle one whit.

The maintenance award was also in error because it was “keyed” not to the wife's standard of living, but to her purported “need in connection with her retention of the family home for the benefit of the couple's eight children.” (CL 9, CP 258) Seven of the

⁸ The wife projected her “pre-tax” monthly expenses to be \$37,658.19, including monthly expenses of \$5,226 for their daughter's post-secondary support, but the husband was ordered to pay 87% (\$4,547) of those expenses. (Ex. 55, CP 283)

parties' eight children are adults. Awarding the wife maintenance to maintain a residence for their "benefit" was akin to awarding the home to the children, or to providing support for adult independent children, both of which are prohibited. *See Sutherland v. Sutherland*, 77 Wn.2d 6, 9, 459 P.2d 397 (1969) (in a dissolution action, the trial court cannot award property to the children if unrelated to support); RCW 26.09.170 (3) (support for a child is terminated upon his or her emancipation).

The wife reported that maintenance for the home alone was over \$10,500 per month. (Ex. 55) A substantial maintenance award "keyed" to allowing the wife to remain in an expensive house for the benefit of the parties' adult children was not warranted. The trial court could not justify awarding the wife \$30,000 per month for the purpose of allowing her to remain in the residence.

Factor 4: Maintenance Was Not Warranted When The Substantial Assets Amassed During The Parties' Long Term Marriage Were Awarded Disproportionately To The Wife, And The Husband Is Near Retirement Age.

The length of the marriage alone is not a basis for maintenance, especially when the wife has already benefited from over a year of temporary support while the dissolution was pending, and received a disproportionate award of the substantial assets amassed during marriage. No further maintenance should have

been awarded as well because the husband, the primary wage earner during the marriage, is now at retirement age. *See Luckey*, 73 Wn App. at 209 (no maintenance to the wife when she received a year of maintenance while the action was pending, a larger share of the property, and the husband “was approaching retirement [at age 61] and experiencing diminished earning capacity”).

Factors 5 And 6: The Wife, Who Is Healthy, Does Not Have The Need For Maintenance, And The Husband, Who Is Nearing Retirement, Does Not Have The Ability To Pay Maintenance While Meeting His Other Financial Obligations.

The wife is healthy and could work if she chose to. Even if she does not, she can support herself without an award of maintenance, as the trial court’s property award left her free of any community debts and obligations.

Meanwhile, the husband does not have the ability to pay spousal maintenance because of his own financial obligations. The husband was ordered to pay a \$1.7 million judgment to the wife, including interest on that judgment of over \$130,000, owed over \$1 million to his business partner, due shortly after trial, and had a malpractice action pending, which could result in a judgment. The husband has a young son who he will be supporting for many years into the future. The husband should be allowed to shore up his

separate estate from his separate income during his final working years, without also paying maintenance to a former wife who received the vast majority of the community assets.

2. The Trial Court Erred In Relying On The Wife's Claim That She Provided More Support For The Family For The First Five Years Of The Parties' 30-Year Marriage.

In making its maintenance award, the trial court also stated that it was “mindful of the factors enumerated in RCW 26.09.090 as well as the flexibility encouraged in *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984).” (CL 6, CP 258) In *Washburn*, the Supreme Court held that “maintenance 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. [] The trial court may consider the supporting spouse’s contribution and exercise its broad discretion to grant maintenance, thereby in effect allowing the supporting spouse to share, temporarily, in the lifestyle which he or she helped the student spouse to attain.” *Washburn*, 101 Wn.2d at 179.

But *Washburn* also held that where, as here, “a marriage endures for some time after the professional degree is obtained, the supporting spouse may already have benefitted financially from the spouse’s increased earning capacity to an extent that would make

extra compensation [in the form of spousal maintenance] inappropriate. For example, he or she may have enjoyed a high standard of living for several years. Or perhaps the professional degree made possible the accumulation of substantial community assets, which may be equitably divided.” *Washburn*, 101 Wn.2d at 181.

In making its maintenance award the trial court relied on the fact that the wife was “probably the greater breadwinner” during the first five years of marriage, when the husband was in his residency. (FF 4, CP 250) But the wife has not worked outside of the home since 1985. She has already benefitted from the “high standard of living” that the parties were afforded as a result of the husband’s career. She will continue to benefit after the divorce, as she was awarded 50% more of the community estate than the husband. This disproportionate award more than “balanced” the parties’ post-dissolution economic circumstances, without the need to also award the wife \$1 million in maintenance.

This is exactly the type of situation, contemplated in *Washburn*, where “extra compensation” in the form of maintenance is not warranted. Even if the wife earned more income during the first five years of marriage, that is not a basis for awarding maintenance a quarter of a century later. Just as the court cannot

award more property to the “major income producer spouse,” it could not award maintenance to the wife because she was a major breadwinner early in the marriage. “The fact one spouse, be it husband or wife, may be the major income producer will not justify giving him a larger share of the community property.” *Marriage of DeHollander*, 53 Wn. App. 695, 701, 770 P.2d 638 (1989).

E. Because The Wife Was Awarded Most Of The Liquid Assets, She Should Be Ordered To Pay The Husband’s Attorney Fees On Appeal.

Appellant asks this court for his attorney fees and costs under RCW 26.09.140. This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The husband has the need for his attorney fees because the property division left him with limited liquid assets. The wife has the ability to pay because she was awarded the majority of the liquid assets, and she has maintenance from which she could pay both her own attorney fees and the husband’s attorney fees.

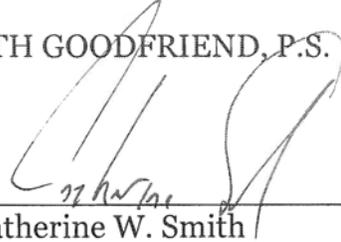
VI. CONCLUSION

This court should reverse and remand, directing the trial court to reconsider its property division, vacate the \$1.7 million judgment, and reconsider its maintenance award.

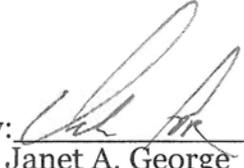
Dated this 18th day of January, 2013.

SMITH GOODFRIEND, P.S.

JANET A. GEORGE, INC. P.S.

By:  _____

Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

By:  _____

Janet A. George
WSBA No. 5990

Attorneys for Appellant/Cross-Respondent

DECLARATION OF SERVICE

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

That on January 18, 2013, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Janet A. George Janet A. George, Inc. P.S. 701 Fifth Avenue, Suite 4550 Seattle, WA 98104-7088	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Thomas G. Hamerlinck Thomas G. Hamerlinck PS 10900 NE 4th Street, Suite 2300 Bellevue, WA 98004-5882	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Kenneth W. Masters Shelby Frost Lemmel Masters Law Group PLLC 241 Madison Ave N Bainbridge Island, WA 98110-1811	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 18th day of January, 2013.



Victoria K. Isaksen

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

In re: the Marriage of:)	
MARY M. WRIGHT,)	
)	
Petitioner,)	NO. 11-3-02992-5 SEA
)	
and)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
KIM B. WRIGHT,)	AT TRIAL
)	
Respondent.)	
_____)	

Before the undersigned Judge of the above-entitled Court, this matter came on for trial on May 29 – June 6, 2012. The Petitioner Mary Wright was represented by attorney Tom Hamerlinck and the Respondent Dr. Kim Wright was represented by attorney Janet George. The Court heard the testimony of the parties and several other witnesses, reviewed the exhibits admitted into evidence and the legal briefing by counsel and heard closing arguments. Having considered the foregoing, the Court now makes the following findings of fact.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - I

HON. WILLIAM L. DOWNING
King County Superior Court
516 Third Avenue
Seattle, WA 98104

FINDINGS OF FACT

1. Although every court case is unique, one can't help but observe that in many respects this is the archetypal long-term marriage in which the wife was a stay-at-home mother raising the couple's eight children while the husband worked hard and commanded a high salary, eventually straying from his marriage vows leading the wife to reluctantly bring an action to dissolve their marriage. This action requires of the court that it set aside types (of all types) and examine the unique circumstances – past, present and future – of each of the parties and determine a fair and equitable division of their marital estate.

2. Mary and Kim Wright met in California in 1977 and were married on June 14, 1980. Ms. Wright soon left behind her work as a nurse and concentrated her energies on the homelife of what would become a family of ten. Meanwhile, her husband, Dr. Wright, was developing his skills as a neurosurgeon. The family home has been in the Seattle area since 1989 and, specifically, in a large waterfront home on Mercer Island since 1993. In 2007, Dr. Wright ventured afield from the family home, taking his skills north to Alaska where he soon began a highly remunerative private practice. He regularly returned home to his family on Mercer Island roughly until the January 2011 arrival of a child he had fathered in Alaska. After a period of uncertainty, Ms. Wright initiated these proceedings on April 26, 2011 which the Court finds to be their date of separation. Their marriage is now irretrievably broken.

3. The eight children born to this marriage (seven girls and one boy) range in age from 31 to 17. Most have gone off to excellent colleges (Gonzaga,

DePaul, University of Santa Clara, University of Idaho) and are now making their way in the world. Two are married. Only 18 year old Laura is still in college while 17 year old Meghan will soon start her senior year at Mercer Island High School. The parties have agreed on a Parenting Plan for the remainder of Meghan's minority.

4. Mary Wright is now 60 years of age. Many years ago, she earned her nursing degree and practiced in this field for several years. During the first five years of the marriage, with her husband in his neurosurgery residency, she was probably the greater breadwinner in the home. Those days soon ended. Taking on substantial obligations in raising her large family - a successful pursuit to which she contributed immeasurably - she has not been employed outside the home during the past 25 years. She is now in good health but unlikely to be seeking future employment.

5. Dr. Kim Wright, at age 59, continues to practice as a neurosurgeon in private practice in Alaska. A pilot and a boater, he is looking forward to retirement before too long. He has a nagging wrist injury and cataracts, but is otherwise in good health. He resides in a lakefront home in Anchorage, Alaska with his one-year-old son Quentin and the child's mother.

6. There is something of a sad "everyman" quality to Dr. Kim Wright. The author of a poignant 2010 letter he titled "Purpose of Life", he does hold a tenuous grasp of that elusive subject. He can marvel at the works of Van Gogh, worry about his children contracting "affluenza" on Mercer Island, appreciate the challenge of a new frontier and observe with a sigh "You get up and go to work

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

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every day and the next thing you know, your life has slipped by." And yet, rather than directly confronting difficult issues, he has tended to fall back into the comfortably familiar role he describes as "the old mule in his harness, pulling the party wagon." His work has always been his passion while, no doubt, also serving as a form of escape or avoidance. Driving a tractor at age 5 and moving sprinklers with a pickup truck at 10 before starting indoor work at a grocery store at 13, he would make it into middle age with all his wisdom teeth and no "last will" because he was too busy working to do the things he knew he should do. His current work station is in the operating room, pursuing a career to which he is quite dedicated and through which his skills have brought him rich rewards. In late 2010, Dr. Wright took his wife to Whidbey Island "to discuss divorce or whatever we were going to do but, in our typical fashion, we avoided the topic." He left town and returned to Alaska to work. And the marriage ("or whatever") stumbled along until April of 2011.

7. The Court is now charged with responsibility for identifying and valuing the assets of the marital community. On this score, the parties are in substantial agreement. The valuations of two significant community assets are in dispute: the interest in the entity known as Alaska Neuroscience Associates, LLC ("ANA") and the family home on Mercer Island.

8. By virtue of the profession for which he trained during his marriage and at which he developed his skills during the marriage, Dr. Wright enjoys a substantial earning capacity now and into the future. An annual income well in excess of \$1 million was the expectation of the parties during their marriage in

Washington. The average annual income for a neurosurgeon in the United States is said to be between one and one-and-a-half million dollars. With his 2007 relocation to Alaska, Dr. Wright actually reduced the number of procedures he was doing by a third and, at the same time, quadrupled his income. That a wide-eyed Neil Beaton, a seasoned forensic CPA, used the word "incredible" to describe this increase says a lot. In the years 2009 through 2011, Dr. Wright's annual compensation averaged around \$5 million. This dramatic increase to a level far above his previous earnings and the national average is attributable to the medical reimbursement rates utilized in Alaska by both private insurers and government entities such as worker's compensation, Medicare, Medicaid and Tricare.

9. In the interests of narrative flow, a few conclusions of law must be inserted at this point. More a creature of the law than of economics, "professional goodwill" is an intangible property interest that can be before a divorce court when that interest has been acquired and developed during the course of a marriage. Related to - but analytically distinct from - future earning capacity, it can be loosely defined as "the expectation of continued public patronage." Although it is not a saleable asset, it is nonetheless an asset of the marital community and one that only one of the spouses will possess and benefit from after a divorce. That spouse - in this case, Dr. Wright - will retain his good standing in the medical and broader communities and that will bring a continuing stream of patrons to the door of his surgical suite. Valuing goodwill - a necessarily imprecise endeavor - involves assessing the extent to which that

process has been responsible for generating income in the past and using that to fix a dollar amount to this intangible asset.

10. An issue of "conflict of laws" has been raised and must be addressed. It is argued by the husband that if this were a dissolution action in the Alaska courts, there would be no monetary value attached to goodwill and that, since we are talking about an asset located in Alaska, that law should apply. The contrary position is that this is a Washington divorce of a couple who primarily resided in Washington during their long-term marriage and all of their marital assets – wherever located – are before the court for valuation and division. In this court's view, Washington's policy interests in consistency and in protecting the financial expectations of these parties are substantial and outweigh the speculative interest of Alaska in not restricting the economic liberty of a divorcing professional spouse in these unusual circumstances. (The arguments regarding "indentured servitude" or being "permanently harnessed" – which could alter the equation if at all descriptive of the court's intended resolution – are not persuasive.) The court concludes that Washington law should apply and Dr. Wright's professional goodwill should be treated as a community asset.

11. Interestingly, the Alaska statutes provide that "earning capacity" is most definitely a factor to be considered in dividing marital assets. Another approach to this same issue is to quantify an asset that has been given the label "spouse's economic benefit expectancy" or "SEBE". See, *In re: Marriage of Freedman*, 35 Wn. App. 49, 665 P. 2d 902 (1983), *review denied*, 100 Wn. 2d 1019 (1983). If this court were to attempt to quantify Ms. Wright's "SEBE" or her

interest in her husband's earning capacity as a marital asset, it would approach that exercise in the same fashion as it does goodwill – and with the same outcome.

12. Dr. Wright has pointed to various factors that he says greatly limit his future earning capacity. These include that his wrist and vision problems will limit or curtail his productivity, that his private payor patients are steadily diminishing and that he is actively contemplating a lengthy sabbatical and/or retirement. The court finds there is some weight to each of these limiting factors but that Dr. Wright will continue his hard work and high income for at least several more years. The health concerns are uncorroborated, although, of course, entirely sensible; the aging process can be expected to bring not only the wisdom that enhances skills but also some less desirable physical effects. With insurance companies and the government tightening up on medical reimbursements in the future, it is likely that Dr. Wright's income will decrease a bit from the high water mark of the past few years but it will remain ample. Finally, the court would conclude that Dr. Wright is most likely to continue working at capacity until early 2015 when he turns 62 and his young son turns four. For purposes of a child support calculation, the court would find his anticipated gross annual income to be \$4,000,000 or a monthly net income of roughly \$180,000 (after taxes and maintenance).

13. As to the valuation of ANA, the court would find the testimony and analysis of Neil Beaton to be the more persuasive. Consistent with the theory of the nature of goodwill, he appropriately avoids making computations that would

attribute to goodwill the aberrational impact of Alaska's reimbursement rates. The court would adopt the application of the discounted excess earnings method by which he valued Dr. Wright's goodwill in a "normalized environment" from which the Alaska factor was removed. Accordingly, the court would find the value of the community's interest in ANA, LLC to be:

Net present value:	\$1,048,206
Professional goodwill:	\$ 366,000
<u>TOTAL:</u>	<u>\$1,414,206</u>

14. The parties' waterfront home on Mercer Island is a two story house that was originally built in 1947 and remodeled in 1994. It now has eight bedrooms and four baths. The lot gently slopes down to 117 feet of Lake Washington waterfront where there is a good dock. The property is located on what is said to be the more desirable west side of the island. If the real estate market were as robust as it was five years ago, the property would sell for a price in the neighborhood of its assessed value of over \$5 million. However, with the market having fallen and financing considerably harder to obtain, there is said to be an ample supply of waterfront homes sitting on the market. Still, this is a particularly attractive site in the context of the comparables suggested by the two testifying appraisers and the court would set the fair market value of the subject property at \$4,500,000.

15. The parties are agreed that Ms. Wright should be awarded the family home. The court envisions that she will likely remain in the residence for an additional two or three years. Until the majority of the parties' children are

fully settled on their own, it will be beneficial that the familiar family home remain available for their occasional use.

16. The court has examined Ms. Wright's budget and agrees that maintaining the family home will be a significant expense for her for this period of time. With her receipt of spousal maintenance in the amount of \$30,000 per month for the next three years (together with her income producing assets and the transfer payments being ordered), she will be able to comfortably remain in the home and also plan for the future. To the extent the emancipated children require further assistance (and all are aware this is not an easy financial time to be in one's 20's), it is expected that their father will be supportive.

17. The Court finds it fair and equitable for the assets and liabilities of the marital community to be valued and divided as reflected in the attached 6 page Appendix.

18. Dr. Wright's future obligations as directed herein shall constitute a lien on his estate and shall be secured by a life insurance policy for at least one million dollars and such additional security as may be reasonably agreed upon.

Having made the foregoing findings of fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 9

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

2. The parties' marriage is irretrievably broken and a decree of dissolution should enter.

3. The marriage was not defunct until the filing of the petition to dissolve the marriage on April 26, 2011 which shall be treated as the date of separation of the parties.

4. The assets and liabilities of the parties shall be disposed of as outlined in the findings above and in the attached 6 page Appendix. In effecting this division, the Court has been guided by RCW 26.09.080 and has considered all relevant factors about the parties' circumstances in arriving at a result it deems just and equitable. In his oft-cited 1982 *Bar News* article, Judge Robert Winsor suggested that, in dissolving a long range marriage such as this one, the court's goal should be to place the parties in roughly equal financial positions for the rest of their lives. Although this "suggestion" was accurately characterized as such in the WSBA's Washington Family Law Deskbook, that latter source has been cited by at least one appellate court in stating the proposition as an imperative. In any event, this Court views itself as having discretion and as having exercised it.

5. The husband shall pay the wife child support in an amount to be calculated utilizing the income figures (including maintenance) as stated herein and both parents shall have responsibility for the children's post-secondary education costs (at the college or university selected by the child in consultation with the parents) in proportion to their relative monthly net incomes.

6. The husband shall pay the wife spousal maintenance in the amount of \$30,000 per month for three years from entry of the decree. In setting maintenance, the Court is, of course, mindful of the factors enumerated in RCW 26.09.090 as well as the flexibility encouraged in In re: Marriage of Washburn, 101 Wn. 2d 168, 179 (1984).

7. The husband's obligations for maintenance and future transfer payments shall constitute a lien on his estate and shall be secured by a life insurance policy for at least one million dollars and such additional security as may be reasonably agreed upon. The future transfer payments shall accrue interest at a rate of 6% per annum.

8. The legal conclusions expressed or implied in the above Findings of Fact numbered 9-11 are incorporated herein as Conclusions of Law.

9. Some concern was expressed on behalf of the husband that the court may "double dip" or even "triple dip" in its handling of his financial situation. In response, several observations may be made. First, the method by which the court assessed goodwill as an asset essentially removed from it the tremendous earning capacity the husband retains through his willingness to practice neurosurgery in the 49th state. Second, the maintenance award is keyed to his ongoing ability to pay and the wife's needs in connection with her retention of the family home to the benefit of the couple's eight children. Finally, the relatively mild disparity in the division of the estate assets is entirely equitable in recognition of the parties' situations as we look not two or three years but ten or twenty or even thirty-two years down the road past the end of their marriage.

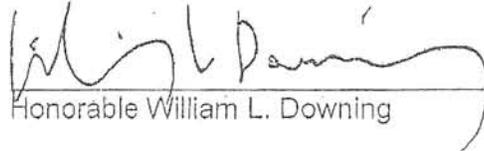
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 11

Hon. William L. Downing
King County Superior Court
516 Third Ave
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That temporary disparity will disappear as quickly as the memory of a harness once one has chosen to throw it off or to redefine it.

10. No doubt there are additional items the court has failed to address either because they were so clearly agreed or simply because it has overlooked them. It is anticipated that additional matters will be agreed upon and incorporated into the final paperwork. During the next fourteen days, the parties shall work together to prepare the necessary final orders to effectuate the rulings indicated herein and submit them to the Court for entry. If agreement is not achieved, alternative proposals may be submitted along with a cover letter explaining any disagreements that remain. Based on those submissions, the Court will enter a Decree of Dissolution and an Order of Child Support.

Dated this 11th day of June 2012.


Honorable William L. Downing

APPENDIX

COMMUNITY PROPERTY

VALUE & AWARDED TO:

	<u>Ms. Wright</u>	<u>Dr. Wright</u>
Mercer Island residence	\$ 4,500,000	
Bellevue condo	\$ 220,000	
Colorado land	\$ 137,500	
Anchorage residence (3608)		\$ 1,500,000
Anchorage residence (4034)		\$ 800,000
Anchorage condo		\$ 330,000
Anchorage hangar		\$ 190,920
<u>Alaska Neuroscience Assoc. LLC</u>		\$ 1,414,206
Alaska Spine Surgery Ctr.		\$ 91,874
Moriarty Dev. LLC		x
<u>Fireweed Lane</u>		\$ 1,150,000
Ace Hangars		\$ 700,000
Wasilla Office		\$ 290,000
WF acct -0635		\$ 78,618
WF acct. - 9956		\$ 999
Southside Dev. LLC		x
E. Dimond Bldg		\$ 54,950
WF acct. -9752		\$ 0
WF acct. -6604		\$ 991
Northrim acct. -2160		\$ 35,456
<u>Wright Bros. LLC prop.</u>		\$ 829,762

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 13

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

	<u>Ms. Wright</u>	<u>Dr. Wright</u>
Screenlife LLC	x	
Madrona Venture (future distributions will be split evenly)	\$ 101,977	
Tully's stock	\$ 775	\$ 775
Interlogis	x	
Supergen	x	
Multipoint Lighting	x	
Chip Shot	x	
PeopleNet	x	
Door to Door	x	
E-Trade -3997	\$ 183,572	
E-Trade -5611	\$ 60,740	
E-Trade -5750	\$ 126,749	
E-Trade -6636	\$ 78	
Weitz -1273	\$ 45,312	
Morgan Stanley -8254	\$ 855,808	
Schwab -1330	\$ 38,700	
ANA CB plan (balance is H's sep. prop.)	\$ 159,544	\$ 159,544
ANA PS plan (balance is H's sep. prop.)		\$ 28,791
Alaska Native PP (Valic)		\$ 50,184
Amer. Funds IRA	\$ 15,073	
Morgan Stanley IRA	\$ 1,053,069	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 14

Hon. William L. Downing
King County Superior Court
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	<u>Ms. Wright</u>	<u>Dr. Wright</u>
Valley Medical 403(B)		\$ 56,796
Valley Medical 457(B)		\$ 56,246
Valley Medical PP		\$ 32,401
BOA CD -8434	\$ 81,910	
BOA CD -0236	\$ 206,959	
BOA -6950	\$ 22,426	
BOA -6984	\$ 25,786	
BOA -2273	\$ 84,487	
Chase -7722	\$ 100	
Chase -7897	\$ 75,305	
US Bank -8850	\$ 1,005	
US Bank -9587	\$ 235,708	
Key -3689		\$ 12
1 st NB -1105		\$ 14,268
1 st NB -7147		\$ 5,000
Northrim -0752 (balance is H's sep. prop.)		\$ 13,146
Northrim -0794 (balance is H's sep. prop.)		\$ 55,643
WF -0928		\$ 13,349
WF -3590		\$ 8,741

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 15

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

	<u>Ms. Wright</u>	<u>Dr. Wright</u>
Household goods (MI)	x	
Household goods (Anchorage)		x
Family photos (to be copied at shared expense)	x	x
Wife's jewelry	\$ 46,575	
Husband's Rolex		x
Lexus	\$ 26,623	
Toyota Camry XLE	\$ 8,059	
Toyota Camry CH	\$ 15,514	
Toyota Tundra		\$ 5,220
Ford Clubwagon	\$ 500	
VW Jetta (Brian's)		
Toyota Camry XL (Julia's)		
Toyota Sequoia		\$ 10,000
Toyota Corolla		\$ 500
Jeep Grand Cherokee		\$ 5,489
Mercedes 300D		\$ 3,000
Honda Valkyrie		\$ 3,905
DeRosa/Davison bikes		\$ 1,600
Polaris ATV		\$ 1,100
Chaparral cabin cruiser	\$ 41,500	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 16

Hon. William L. Downing
King County Superior Court
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Seattle, WA 98104

	<u>Ms. Wright</u>	<u>Dr. Wright</u>
Platform boat lift	\$ 3,000	
Mastercraft ski boat & trailer		\$ 9,425
Mastercraft lift	\$ 2,000	
Shorelander trailer	\$ 280	
10' sailboat		x
Walker dinghy	\$ 200	
Avon inflatable		\$ 275
Yamaha jet ski	x	
Seadoo	x	
Honda generator		\$ 525
Mooney Bravo		\$ 183,000
Piper Super Cub 180 HP		\$ 93,511
Piper Super Cub		\$ 83,868
Cessna float plane		\$ 143,582
Term life ins. policies		x
MICC membership	x	
Grand Wailea membership		x
2011 income tax refund (est.)	\$ 150,000	\$ 150,000

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 17

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

Ms. Wright

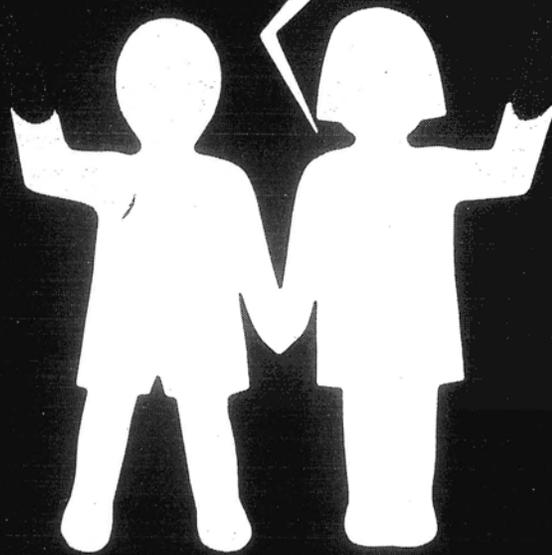
Dr. Wright

TRANSFER PAYMENTS (H to W)

Entry of Decree	\$ 200,000	(-\$200,000)
January 15, 2013	\$ 500,000	(-\$500,000)
January 15, 2014	\$ 500,000	(-\$500,000)
January 15, 2015	\$ 500,000	(-\$500,000)

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DISILLUSION, DISSOLUTION & SOLUTION

This is different from the mandatory Family Law Department settlement conference, as required in King County, where, prior to trial, the parties meet with a Superior Court judge in a formal attempt to resolve issues. The mandatory King County settlement conference concept can be utilized outside King County. Ask your local Superior Court judge to allocate forty-five minutes for a late afternoon conference in his or her chambers or jury room. At the conference, everyone is given an opportunity to look at the case objectively. The judge acts as an advisor and each side, including the parties themselves, presents its point of view, sets forth contested issues, and presents an argument on how the issues could be resolved. Legal points at issue are also discussed and evaluated, and detailed information is given regarding community assets and obligations.

After hearing both presentations, the judge weighs the issues and evidence and gives an advisory opinion on what might be a likely result at trial. This opinion is often persuasive and may encourage a settlement.

To encourage frank and candid discussion in the conference, the parties should stipulate that the settlement judge cannot hear the matter if trial is necessary. Such is the case by local rule in King County.

Conclusion

One of the most valuable assets of a lawyer who

recognizes the importance of counseling in domestic relations law is the ability to recognize when and to whom the client should be referred for other professional help. The lawyer should be sufficiently aware of the mental health resources available in the community to advise the client on how to select a counselor to avoid the uncertain outcome associated with sending a client to the yellow pages.¹¹

The attorney should realize the dynamics of the client's problem and a lawyer's own limitations in the counseling role. While these limits are debatable, it can be argued that the lawyer's objective should be to play a more active counseling role. The question has often been raised whether an interested lawyer who is untrained in the mental health field should even attempt counseling. The very nature of a lawyer's activities forces the lawyer into the role. The family law attorney has an obligation to learn and improve counseling skills. Law schools and CLE programs need to offer more clinical training to further that end.

A lawyer who has an intellectual interest in understanding human behavior, who is sensitive to human problems, and who is willing to analyze his or her own actions in the attorney-client relationship, can and should perform this valuable counseling role. It is sheer fiction that a lawyer plays a neutral role, merely implementing the wishes of one of the parties. Efforts are expended by every conscientious attorney to ensure that the decision to obtain a divorce is an appropriate one. A lawyer needs a special temperament to be a competent practitioner of family law. A client's needs must be acknowledged, understood, and supported. The goal I advocate is to reach a fair and equitable settlement.¹²

¹¹The Seattle-King County Bar Association Family Law Section has published a list of mental health professionals who are interested and experienced in marital counseling.

¹²I give thanks to Ruth Nelson, Marywave Van Deren, and John Gadon for research help and to those lawyers and associates who took valuable time to review this article and offer constructive comments that improved its content and overall quality.

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Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions

by Robert W. Winsor

[*Prefatory Note: In September 1980, the King County Superior Court created a Family Law Department. Five judges (Gerard Shellan, presiding, Nancy Ann Holman,*

Norman Quinn, Anthony Wartnik, and I) were the first assigned to that Department. We all served until June 1981 when we began, one every two months, to be replaced by successor judges. The Family Law Department is assigned all marital dissolution matters. The judges have alternated their time between settlement conferences (mandated prior to assignment of trial date) and trials. In an effort to become better informed and more predictable the judges have held weekly breakfast meetings, primarily devoted to discussion of a concluded case, to compare ideas about what each of the others might have done with the same facts. This article has developed out of those experiences. I first submitted it to the other judges for comment. It is my perception that there was substantial agreement with the views here expressed.]

Under the law in Washington the trial judge has a wider discretion in making decisions in dissolutions of marriage than in any other area of his or her work. That this rule applies most obviously in a case of child custody is well known and is not the topic of this memorandum. Rather, this paper will deal with the problem presented by the fact that this very broad discretion applies also in matters of division of properties, setting of maintenance and child support, as well as attorneys' fees.

The unguided burden that falls upon the trial judge is stated as well in the case of *Baker v. Baker*, 80 Wn.2d 736 (1972) as in any other case. One of the issues concerning the Court in that case was whether certain properties were separate or community, and it was argued that the answer to that question is determinative of the distribution of the properties by the judge. The Court stated:

"The court in a divorce action must have in mind the correct character and status of the property as community or separate before any theory of division is ordered. . . Characterization of the property, *however*, is not necessarily controlling; the ultimate question being whether the final division of the property is *fair, just and equitable* under all the circumstances." (page 745) (emphasis added)

Likewise, in the same case, the Court enunciated the trial judge's discretion in the case of maintenance:

"The court should, when awarding alimony at the divorce of a long marriage, consider and weigh the future earning capabilities of both parties and allow the wife such sums for whatever period of time

Judge Winsor was in general law practice in Seattle for 18 years and has served on the King County Superior Court bench for 9 years. He has taught in the Washington Judicial Education program for five years and has been, since 1978, a faculty member of the National Judicial College.

seems right under all the circumstances." (page 744) (emphasis added).

The Marriage and Dissolution Act of 1973, RCW 26.09, specifies factors that must be considered by the trial judge in making property divisions (26.09.080) and maintenance (26.09.090) but does not change the prior law, leaving to the discretion of the trial judge the problem of what resulting award is appropriate after considering all of the required factors. *Marriage of Nicholson*, 17 Wn.App. 110 (1977); see also "Property Dispositions in Dissolution Proceedings: The Criteria in Washington", 12 Gonzaga Law Review 492 (1977).

It is perhaps flattering and maybe even comforting sometimes to a trial judge to know that so much trust is placed in her or him. On the other hand, it is almost always a dilemma to know what direction to take with all that discretion. It is this dilemma that has led me to believe that it may be useful to try to lay down some general principles that seem applicable in broad categories of cases. That is to say, in what general direction lies "fairness" or, how are we to know what should "seem right"?

General Considerations Affecting Property Division and Maintenance

I have found it helpful to establish three categories of



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cases, based upon the duration of the marriage:

1. Short Marriage: Those lasting approximately 5 years or less.
2. Long Marriage: Those lasting approximately 25 years or more.
3. Mid-range: All the others.

In the case of a short marriage, the marriage has in fact not been the significant event that normally is presumed. Particularly, there has not been a long reliance on the marital partnership. Therefore, the emphasis should be to look *backward* to determine what the economic positions of the parties were at the inception of the marriage and then seek to place them back in that position, including provision for interest or inflation, if feasible. After doing that, if there are properties left over they presumably would be divided about equally. Presumably in a short marriage maintenance would not be paid, except in extraordinary circumstances or perhaps for a very brief adjustment where necessary. *e.g.*, if one of the parties gave up a job to relocate or otherwise accommodate to the marriage, that would be an extraordinary reason to either adjust the decision regarding property or allow brief maintenance during a relocation period.

In the case of a long marriage, the goal should be to look *forward*¹ and to seek to place the spouses in an economic position where, if they both work to the reasonable limits of their respective earning capacities, and manage the properties awarded to them reasonably, they can be expected to be in roughly equal financial positions for the rest of their lives. Long term maintenance, sometimes permanent, is presumably likely to be used unless the properties accumulated are quite substantial, so that a lopsided award of property would permit a balancing of the positions without (much) maintenance. *In re Marriage of Rink*, 18 Wn.App. 549 (1977) (In a 24-year marriage 2/3 of the property was awarded to the wife, along with maintenance for a brief time.)

In the traditional marriage relationship where one spouse devotes prime energies outside of the home earning money for the family and the other devotes prime energies raising children and maintaining a nurturing household, there is in a sense a contractual relationship entered into at the time of the marriage where the parties understand their respective primary obligations and undertake them willingly in the understanding that they both expect that the marriage is a long term (presumably life-time) commitment and that each will be protected and provided for by the other. When a traditional long marriage fails, however, one of the spouses usually is stranded in a situation where she (sometimes he) is very much behind the other in earning capacity. The judge should redress the balance.

For example, in a long marriage where H has an annual income of \$50,000 and W probably will be

unable to earn more than \$10,000 annually, W should either have substantial permanent maintenance (perhaps \$15,000 annually) in addition to an equal division of property, or (if there is very substantial property) a disproportionate share of the property. It is often argued by H's lawyer in such a case that since W can earn \$10,000 annually there is no "need" to justify maintenance. "Need" is a relative term and must be judged in the context of the circumstances of the particular parties.

Mid-range marriages will partake more or less of the long or short marriage considerations and goals as set forth above, depending primarily upon the length of the marriage and the necessities. Maintenance, where appropriate, is likely to be used only for fixed terms of months or years in these settlements. The term "rehabilitative maintenance" applies most generally to mid-range cases.

Where child support must be assessed, regardless of the length of the marriage, there should be a two-step process in the decision making. First, the considerations set forth above should be applied to achieve a preliminary decision about division of property, maintenance and related items. Then, as hereafter discussed, the needs of the respective households to provide for the children should be overlaid and adjustments made, if necessary, in light of the child support that seems feasible.

Lawyers Fees

The law of course permits the judge to order that one party pay the lawyer fees of the other party if there is a "need" on the one hand and an "ability to pay" on the other. RCW 26.09.140. However, it is ordinarily a desirable goal to avoid doing so for several reasons.

1. It is often a bitter pill—one that can make an otherwise acceptable decision unacceptable—to force the one party to pay the (very often disliked) other lawyer.
2. It interferes with the natural control (check and balance) on lawyer fees that exists in the normal lawyer-client relationship, *e.g.*, no way for the payor to blow a whistle or take his business elsewhere if it begins to appear from monthly or other periodic billings that fees are getting out of hand; no control that inheres in the normal situation where the lawyer may decide to reduce extraordinary fees in the hope that the client will leave on a happy basis and return with other cases or refer friends to the lawyer.
3. If one party is left by the judge's decision substantially more "in need" of help to pay a lawyer than the other party it is presumably

evidence that the judge's decision regarding property and maintenance is ill advised. At least in all long marriages, and in most mid-range marriages, the parties should be equally able (or, more often, unable) to pay lawyer fees and court costs.

The obvious exception is the modification action where it may appear that one party is the more stubborn and has long delayed an obvious need for adjustment of child support and thereby necessitated the other party's having to hire a lawyer.

Child Support and Maintenance Levels

Human nature being what it is, we all have, or can easily develop, legitimate needs and uses for all the income available to us. For this reason, detailed itemizations of living expenses, now routinely required by our local rules, are not very helpful to the judge in deciding what support is appropriate, and they are a time-consuming and costly burden for the parties and lawyers. In the rare situations where the total of the detailed expenses adds up to less than the actual income of the party, it usually means that he or she has not taken enough time to carefully compile the list. It would probably be more helpful if we made such a listing

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optional but required that the parties respond to a statement such as the following:

"If you believe that certain of your expenses of living are extraordinary, such as daycare for a child, orthodontia, psychiatric care, extraordinarily large housing expenses, or the like, give the details thereof."

Child support for more than one child should never be stated in terms of a multiple of one amount "per child." For example, if there are four children, the needs of the custodial spouse for child support are not reduced by 25% when the first child is emancipated. As hereafter suggested, child support schedules have their considerable limitations; but the King County support schedule has an important positive feature in that it posits that the level of support for four children (termed as a percentage of the income of the noncustodial parent) reduces from 48% for four to 42% for three children; 34% for two; and 24% for one. Those differentiations between the various levels are probably pretty close to the mark. Accordingly, if there are four children a total sum should be stated for the four and then provision made for reduction by about 12% (6/48) when the first is emancipated, thereafter a further reduction of 20% (8/42) when the second is emancipated, and a third reduction of 30% (10/34) when the third is emancipated.

There seems to be a consensus that in the normal case some form of escalation clause should be built into the support award in the hopes that it will obviate the expense and trauma of the parties' having to return to court for adjustments for inflation or normally-anticipated income appreciation of the noncustodial parent. Some judges use the Consumer Price Index. Others prefer a percentage of income. Some use a combination.

Child support schedules, particularly those that do not relate to the income of both parents, are of only limited value. Rather, the most important test of the propriety of support is a comparison of the spendable dollars in the two households affected, together with consideration of the number of people to be supported in each household.

For example, assume that H has a gross wage of \$2,000 per month and a net (after income tax and social security) of \$1,500, and then assume that W is given custody of two children in three different situations:

- (a) The children are ages 1 and 3. W is needed at home and not employed. It might be appropriate that undifferentiated maintenance and child support be set at \$1,000 with the assumption (estimated) that thereby H's income taxes will be reduced leaving a revised net of \$1750 and therefore leaving him with \$750 to support

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himself alone and an estimated \$900 for W to support herself and the two children, after she deducts the (estimated) \$100 income tax she must pay on the \$1000.

- (b) If the children are ages 6 and 8 and W is employed part-time earning a net of \$400, there would be perhaps no maintenance but there might be child support at \$650, as that would give W a total of \$1,050 to support herself and the two children and leave \$850 for H alone.
- (c) Finally, if the children are ages 12 and 14 and W is employed fully and earns a net of \$1250, child support might be set at \$400, as that would provide \$1650 in the home where W and two children live and allow \$1200 in the home where H resides alone.

Conclusion

Washington case law and statutes lay down many factors that the trial judge must consider in exercising her or his discretion in marital dissolutions, but I know of no comprehensive statement of the goals that are to be achieved. There will doubtless be considerable disagreement with the specific examples and perhaps the goals as I have stated them, but at least it is a beginning that may be helpful in searching for a consensus.

¹In re Marriage of Clark, 13 Wn. App. 805 (1975) which involved a 34-year marriage, the court said: "The key to an equitable distribution of property is not mathematical preciseness, but fairness. This is attained by considering all of the circumstances of the marriage, past and present, with an eye to the future needs of the person involved. Fairness is decided by the exercise of wise and sound discretion, not by set or flexible rules." (emphasis added) (page 810)

Family Law: Strategy and Tactics

by Maryalice Norman

Conventional wisdom among lawyers holds that family law practice doesn't amount to much, that anyone with the stomach for it can do it.

Wrong. There may be more bad domestic relations law practiced than any other kind, largely because of the widespread belief that there's nothing to it.

Conventional wisdom is right about one thing, though. You need to have a taste for family law. If you do not have it, you have to develop it. If you only handle a family law case once in a while, you will need to work

at it hard, or face the fact that you will do a poor job for your client.

Strategy

1. *Your client* is where your overall strategy begins. What does your client want? Is it reasonable; is it too much or too little? Some spouses (male and female) are so stricken by the break-up of a marriage that they withdraw from the battle. If your client wants to give away the farm, is that reasonable for the long haul? Sometimes it is, but usually it hurts everyone to allow a one-sided settlement.

On the other hand, if your client wants revenge, do you go along with that? A settlement based on revenge will cause widening circles of damage, often engulfing your client along with the other spouse and children.

So your first step is to decide what is to be achieved and whether you can handle your client. If you cannot or do not want to, then withdraw and let the client find another more simpatico lawyer.

2. *The goals* to be achieved should be specified, in writing, so both you and your client know where you are headed. These goals should be realistic, that is, founded

Seattle attorney Maryalice Norman is a family lawyer in the firm of Norman & Loreen. She is chairperson of the Editorial Advisory Board.

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AK Spine Surgery		\$ 91,874
Moriarity Development		\$ 2,219,617
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Southside Development		\$ 91,397
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Wright Bros. (S/P)		zero
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Stocks	\$ 1,311,734	\$ 775
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ANA PS		\$ 28,791
Alaska Native		\$ 50,184
IRAs	\$ 1,068,142	zero
Valley Medical		\$ 145,443
Bank Accounts	\$ 733,686	\$ 110,159
Personal Property		
Jewelry; Vehicles; Boat/Planes; Tax Refunds	\$ 294,251	\$ 695,000
Subtotal	\$ 8,526,834	\$ 5,208,124
Cash Transfer Payment	\$ 1,700,000	(\$ 1,700,000)
Interest on judgment	\$ 131,425	(\$ 131,425)
TOTAL	\$10,358,259	\$3,376,699
	75.4%	24.6%
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