

62702-3

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NO. 62702-3-I
DIVISION NO. I
COURT OF APPEALS
STATE OF WASHINGTON
IN RE: MARRIAGE OF:
GRACE LOUISE AMAN,
Petitioner,
and
CRAIG SCOTT AMAN,
Appellant.

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REPLY BRIEF OF APPELLANT

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I. REPLY TO INTRODUCTION OF RESPONDENT

Both parties agree that a trial court has discretion in making decisions regarding spousal maintenance and property division in a dissolution of marriage case. Brief of Appellant, pp. 10-11; Brief of Respondent, p. 1. However, the “abuse of discretion” standard does not insulate a trial court from review of decisions that fail to correctly follow the law that applies to awards of spousal maintenance or division of property. An award of spousal maintenance that “does not evidence a fair consideration of the statutory factors results from an abuse of discretion.” *Marriage of Spreen*, 107 Wash.App. 341, 347-349, 28 P.3d 769 (2001). A division of property that is based on untenable grounds is an abuse of discretion. *Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005). The abuse of discretion standard does not protect a decision that incorrectly applies the law.

In the introduction to her brief, Mrs. Aman asserts that Mr. Aman raised certain claims on appeal for the first time. The documents submitted in this case contradict her assertion.

Mr. Aman does not ask this court to substitute its judgment for the opinion of the trial court. He asks the Court to apply the laws relating to

an award of spousal maintenance and division of property to correct the legal errors that were made by the trial court.

II. REPLY TO “COUNTER STATEMENT OF FACTS”

On pages 2-4 of her Brief, Mrs. Aman summarizes her testimony about the injuries, afflictions, and ailments that she experienced throughout her life. However, the following expert opinions established that her back injury was the only physical problem that affected her at the time of trial.

A. Medical Evaluation of Respondent.

The court admitted Mrs. Aman’s Ex. 62, the stipulated testimony of John K. Hsiang, M.D. In Section 2 of Ex. 62, Dr. Hsiang stated that he was treating Mrs. Aman for “low back pain.” Ex. 62, p. 1, line 22. The second page of Ex. 62 contains the following statement, “Dr. Hsiang will testify that Grace Aman’s spinal condition limits her work capacity and tolerance due to pain, weakness and inability to stand on her feet for long periods of time.” Ex. 62, p. 2, lines 11-13. Dr. Hsiang’s opinion of the Respondent’s ability to work was summarized on p. 2, lines 13-16 of Exhibit 62:

While she is currently capable of performing sedentary to light office/desk work, she is limited to part-time hours, not

sitting/standing greater than 30-45 minutes at a time, no lifting greater than 20 pounds at the most and no extensive twisting/bending of the hips.

B. Vocational Evaluation of Respondent.

The court also admitted, at Mrs. Aman's request, Ex. 35, a vocational evaluation of Mrs. Aman conducted by Kathy Reid. Ms. Reid reviewed reports from Seattle Radiologists and Evergreen Radia Imaging, and reviewed Dr. Hsiang's response to her vocational questions in preparing her report. Ex. 35, p. 1, "Medical History." After reviewing these reports, interviewing Mrs. Aman, and performing tests upon her, Ms. Reid stated:

In conclusion, Ms. Aman is presently able to earn about \$10,000 to \$15,000 per year but will have severely limited access to jobs due to her physical restrictions, lack of transferrable skills, recent experience and current references. She is unlikely to receive benefits in part-time employment. With two (or up to four) years of community college her job prospects should be improved. Total costs are estimated at \$6,000 to \$7,200 but these may be more if she attends part time and/or online classes. I would then expect her to be able to earn up to \$25,000 but still not receive full benefits.

Mrs. Aman's physician and the rehabilitation counselor agreed that the only physical condition that affected Mrs. Aman's ability to work was the condition of her back. Ex. 62, page 2, Section 5; Ex. 35, page 5.

Neither of these experts stated that the other ailments that were described in Respondent's Brief affected her at the time of trial or impacted her ability to work.

In page 3 of Respondent's Brief, she admits that her physical condition did not prohibit her from getting the parties' daughter, Lauren, up and off to school each day, volunteering at Lauren's school, transporting Lauren to and from her activities, and assisting in those activities. She presented no testimony that her ability to perform these activities would change after she moved to Arizona. From the statements that she makes on pages 3 – 4 of Respondent's Brief, the Court could conclude that Mrs. Aman would continue to perform these activities after she moved to Arizona.

The representation of Mrs. Aman's testimony regarding her monthly living expenses in Arizona, contained on page 4 of Respondent's Brief, makes reference to testimony of Mrs. Aman that was disallowed by the Court. For example, on page 4 of Respondent's Brief, Mrs. Aman states, "She anticipated a need for a deposit for first and last month's rent of \$5-6,000. RP, June 24, 2008, p. 101." The Court sustained Mr. Aman's objection to that opinion for lack of foundation. *Id.* When she attempted to testify about her opinion as to the cost of utility expenses in Arizona, the trial court also sustained Mr. Aman's objection to her

testimony for lack of foundation. RP, June 24, 2008, pp. 102-103. Mrs. Aman cited no other testimony or evidence that she presented which would establish the amount of her monthly living expenses that she would incur after she moved to Arizona.

On pages 4 and 5 of the Respondent's Brief, Mrs. Amsn appears to argue that she received few proceeds from the sale of the residence. Her argument is rebutted by the spreadsheet that is attached as the last page to the Order on Motion to Amend Final Orders and Approve Disbursement Calculations (Ex. 2, Brief of Appellant). The spreadsheet, which the trial court approved (Brief of Appellant, Exhibit 2, Page 1), shows that Mrs. Aman received house sale proceeds of \$70,037.11. Mrs. Aman does not explain why this amount of funds would be considered "little or no proceeds to the wife under the Decree of Dissolution." Brief of Respondent, p. 5.

Mrs. Aman mentions, on page 5 of her Brief, an argument that she advanced at trial, which the trial court rejected. In the Decree of Dissolution, which Mrs. Aman prepared, the Court struck her proposed language that stated that the amount of \$64,000 that Mr. Aman withdrew to pay community debts should be considered "a predistribution of property to him." CP 144. The Respondent did not appeal this decision. Its relevance to this case is unknown.

Mrs. Aman argues, on page 5 of her Brief, that she has “no ability to return to employment that she held in the past.” Her own statements contradict this argument. She told Kathy Reid, the rehabilitation counselor, that she considered the possibility of “getting back in sales or restarting Life Safe.” Ex. 35, p. 3. She also expressed interest in working in personnel jobs. *Id.* Both Kathy Reid and Dr. Hsiang stated that she could work on a part-time basis. Ex. 35, p. 6; Trial Ex. 62, p. 2, Section 5. She sold real estate for Coldwell Banker for four years. RP 33, June 24, 2008. Selling real estate would allow her to utilize her sales experience and work a reduced number of hours.

Kathy Reid and Dr. Hsiang also contradict Mrs. Aman’s description of her ability to lift weight that is contained on page 6 of Respondent’s Brief. Dr. Hsiang stated that she has the ability to lift up to 20 lbs. Mrs. Aman told Kathy Reid that she could lift between 15 and 25 lbs. Trial Ex. 35, p. 2. She also told Ms. Reid that she had the ability to box up her belongings and paint the house for up to two hours before she needs to rest. *Id.* Dr. Hsiang, in Ex. 62, did not state that Mrs. Aman experienced stiffness in her neck and shoulders or numbness in her left leg, as Ms. Aman describes on page 6 of Respondent’s Brief. He also stated that she could stand for up to 45 minutes at a time. *Supra*, p. 2, Section 5. He also did not state that sitting caused her pain. Ex. 62.

Mrs. Aman told Kathy Reid that she was interested in returning to college. Ex. 35, p. 3. She confirmed this interest when she testified that she would take on-line courses through the University of Phoenix within one month after she relocated. RP, June 25, 2008, pp. 2-5.

Although Mrs. Aman argues, on page 7 of her Brief, that “Craig’s expenses are much lower than those he listed on his financial declaration,” the testimony cited in that section of her Brief does not support this conclusion. In that section of the testimony, RP, June 25, 2008, pp. 52-68, Mr. Aman explained all of the entries in his financial declaration. The amounts of each monthly expense that he described in his financial declaration were not overstated.

Mrs. Aman continues to misrepresent testimony in the next paragraph on page 7 of her Brief. What she tries to characterize as “a minor injury to his shoulder” actually caused Mr. Aman to take disability leave from the fire department. RP, June 25, 2008, pp. 158-164. During the incident, Mr. Aman tore the muscles between his left shoulder blade and spine, and dislocated a rib. RP, June 25, 2008, p. 158. Contrary to the assertion, contained on page 5 of Respondent’s Brief, that the City of Seattle and State of Washington are closing its claim, Mr. Aman stated that he was trying to keep the claim open at that time because the pain had not resolved and he did not have 100% strength. RP, June 25, 2008, p.

165. When Mrs. Aman states, on page 7 of Respondent's Brief, that Mr. Aman "showed no signs of limitations due to his prior shoulder injury," she is restating her own observations that she made during the limited occasions when she spent time with Mr. Aman. At the time of trial, Mr. Aman testified that he had daily pain that escalated through the day, numbness and tingling in his arm and hand, and at times a sharp pain that comes back from deep respiration. RP, June 25, 2008, p. 162.

The description of the award of Mr. Aman's 401(k) plan that is contained on pages 8 and 9 of Respondent's Brief is misleading. The Decree of Dissolution (CP 102- 114) awarded \$50,000 to Mrs. Aman from Mr. Aman's 401(k) plan, and the balance of the Plan to Mr. Aman as part of the Court's 60/40 division of the assets of the parties. CP 112. The trial court signed the Decree of Dissolution on September 24, 2008. CP 106. Mr. Aman's proposal that was mentioned on page 8 of Respondent's brief was contained in a spreadsheet (CP 170) that was attached to Mr. Aman's Motion for Clarification and Reconsideration that was filed on October 6, 2008. CP 154-174. The value of the 401(k) plan, \$106,301.56, that was stated on the spreadsheet represented the balance shown on March 31, 2008. CP 170.

When Mrs. Aman filed her Motion to Amend Final Orders and Approve Disbursement Calculations (Ex. 1 Brief of Appellant), almost a

year had passed from the date of the entry of the Decree of Dissolution. Mrs. Aman provided no evidence showing that she requested a disbursement of the 401(k) plan proceeds prior to the time that all the property of the parties were to be disbursed after the sale of the residence.

Mr. Aman opposes the request by Mrs. Aman for an award of attorney's fees.

III. RESPONSE TO SUMMARY OF ARGUMENT AND ARGUMENT OF RESPONDENT

A. Respondent Submitted No Admissible Evidence to Establish the Financial Obligations That She Would be Required to Pay When She Moved to Arizona.

In considering a request for spousal maintenance, RCW 26.09.090(e) requires the court to consider the “financial obligations of the spouse or domestic partner seeking maintenance.” *Id.* On page 12 of Respondent’s Brief, Mrs. Aman makes several arguments, without any citation to the record or to legal authority, that the trial court could rely upon Mrs. Aman’s representations about the living expenses that she expected to incur after she moved to Arizona to determine what her “financial obligations” would be when she moved to Arizona. Mr. Aman asks the Court to reject Mrs. Aman’s arguments for which she cites no authority. *Bercier v. Kiga*, 127 Wash. App. 809, 824, 103 P. 3d 232 (2004).

The record establishes that the court did not allow Mrs. Aman to testify about her projected expenses in Arizona for rent (RP, June 24, 2008, pp. 100-101) and utilities. RP, June 24, 2008, pp. 102-103. She had no personal experiences from which she could provide accurate representations about the amount of the living expenses that she would incur when she moved to Arizona, which she had not visited since 2006. RP, June 24, 2008, p. 144.

As the party seeking maintenance, Mrs. Aman would be the only person who could testify as to the “financial obligations of the spouse or domestic partner seeking maintenance.” RCW 26.09.090(e). When she did not have personal experience from which she could estimate her costs of living in Arizona, she could not provide the trial court with the information that it needed, pursuant to RCW 26.09.090(e) to determine what her financial obligations would be.

At the bottom of page 12 of Respondent’s Brief, Mrs. Aman seems to argue that Mr. Aman did not preserve his right to challenge the award of maintenance that the trial court made. This argument is without merit. As described in this section of this brief, Mr. Aman objected to Mrs. Aman expressing opinions about the costs of living in Arizona because she lacked personal experience from which she could make those estimates. RP, June 24, 2008, pp. 100-103.

In addition, Mr. Aman filed post-trial motions which were necessitated by the manner in which the trial court conducted this case. The trial court never issued an oral ruling in this case. It entered pleadings that were submitted by Mrs. Aman, on which it made hand-written modifications. CP 131-145 and 102-114. Mr. Aman filed a Motion for Clarification and Reconsideration in which he asked the court to reconsider the division of property, the allocation of responsibility to pay debt and the maintenance award that it made in this case. CP 154-174. Mr. Aman specifically argued in his Motion for Clarification and Reconsideration that Mrs. Aman presented no evidence that would establish the amount of her living expenses when she moved to Arizona. CP 161. The court denied Mr. Aman's Motion for Clarification and Reconsideration. CP 246-247. Therefore, this issue was preserved for appeal.

B. Respondent Cites To No Portion of the Record that Supports Findings of Fact 2.12 and 2.21.

On page 13 of her Brief, Mrs. Aman continues to make arguments without citing to the record. No medical professional rendered an opinion during trial that Lauren had "unusual medical needs," as she asserts on page 13 of Respondent's Brief. Lauren receives treatment for scoliosis. CP 142. To treat Lauren's scoliosis after she moved to Arizona, Mrs.

Aman and Lauren planned to make one trip every three months to visit Lauren's doctor in Studio City, California. RP, June 24, 2008, pp. 70-71, 149-50. She cites to no other portion of the record that describes any other treatment that Lauren receives which would require an expenditure of time by the Respondent. Mrs. Aman did not describe, on page 4 of her Brief, any "physical therapy" that Lauren receives which was mentioned in Findings of Fact 2.12 and 2.21.

Mrs. Aman also does not cite to any portion of the record that supports her conclusion that the physical activities in which Lauren was engaged are necessary for treatment of her scoliosis. No evidence supported the finding, contained in Findings of Fact 2.12 and 2.21 that, "while such activities are important for all children, they are particularly important for Lauren to maintain her physical health and her emotional health given her condition."

On page 13 of Respondent's Brief, Mrs. Aman argues that this issue was being raised for the first time on appeal. Mrs. Aman incorrectly characterized the issue to be resolved by the Court. In awarding maintenance, the Court made the finding that was quoted on page 16 of the Brief of Appellant. As Mr. Aman argued in that Brief and in this Brief, the findings that the Court made were not supported by the evidence. Mrs. Aman presented no evidence that the amount of time that she spent caring

for Lauren would significantly impact her ability to obtain an education and earn income. Mr. Aman asks this court to find that no evidence supporting the finding, quoted on page 16 of the Brief of Appellant that Mrs. Aman's involvement with Lauren impacts her ability to obtain employment more than would the involvement of any mother with a child.

Although, on page 13 of her Brief, Mrs. Aman argues that she was required to contribute time to the performance of Lauren's school activities, Respondent cites to no portion of the record in which she describes the activities in which she is involved, the amount of time that she spends engaging in these activities, and her future plans for performing these types of activities. By citing to no portion of the record that contained this testimony, Respondent concedes that no testimony supported the portion of Findings of Fact 2.12 and 2.21 that, "Grace is heavily involved in providing transportation for Lauren in her various activities. Grace also volunteers at Lauren's school two days per week." There also was no testimony to support the finding that "All Catholic schools require significant parental contributions of time."

Because there was no testimony to support these findings, they are not supported by the record.

C. The Court Did Not Determine The Value of the Parties' Residence at the Time That It Awarded Maintenance.

To accept the argument made by Respondent on pages 14 and 15 of her Brief, the Court must conclude that the trial court had calculated the amount of the net sale proceeds of the residence that it expected each party to receive. No evidence in the record supports this conclusion. The documents that the trial court entered establish that it did not know how much either party would receive from the sale of the house.

As stated earlier, the trial court did not issue an oral decision in this case. Its ruling was contained in the final orders that it entered. CP 131 – 145 and 102 – 114. The trial court made the following findings relating to the sale of the house.

The parties have a family home. The home shall be sold as soon as reasonably possible at a reasonable price. The home shall be listed for sale thereafter with an agent determined by agreement. Decisions on accepting offers, counter-offers, listing agent, listing terms, etc. shall be determined by agreement and, if not agreed, determined by Michael Louden in binding arbitration. Parties shall pay such costs 60% (by husband) and 40% (by wife) except that Louden shall have the authority to reallocate such costs in his discretion.

Once sold, the existing mortgage shall be paid off from the proceeds at closing. The husband shall be required to timely pay the mortgage, taxes and insurance until the

home is sold and such sale has closed. He shall be entitled to reimbursement of such sums paid, from the date of this Order.

The sale proceeds shall be paid to the trust account of Nancy Hawkins. It shall be disbursed to achieve, along with the enclosed spreadsheet, an overall division of 60% to the wife, and 40% to the husband.

CP 144-145. In these findings, the trial court directed the parties to sell their home “at a reasonable price.” The court did not state what it believed to be a “reasonable price.” These findings establish that the trial court was aware that offers and counter-offers could change the sale price of the house. By providing that disputes between the parties could be arbitrated, the trial court also recognized that the amount that each party received was subject to change. The trial court was also aware that the list price of the residence could be reduced by market forces or the agreement of the parties. This language of the Decree of dissolution showed that the trial court acknowledged that the mortgage, costs of sale, taxes and insurance would reduce the amount of the available sale proceeds that the parties received.

In the Decree of Dissolution, the trial court did not state that Mrs. Aman should receive a certain amount from the house sale proceeds. If it wanted Mrs. Aman to receive a fixed amount, it could have inserted that amount into the Decree of Dissolution. The absence of a fixed dollar

amount as an award to Mrs. Aman from the house sale establishes that the trial court did not rely upon an assumption, as argued by Mrs. Aman, that she would receive \$50,000 from the house sale proceeds.

No evidence supports Respondent's argument that the court believed that "the wife would receive over \$100,000 in house proceeds." Brief of Respondent, p.14. As with the other arguments contained in this section of her Brief, Mrs. Aman cites no section of the record that supports this statement. Mr. Aman asks the court to reject this argument because no evidence supports it.

On page 15 of the Brief of Respondent, Mrs. Aman argues that the issues relating to the effect of the house sale proceeds upon the award of maintenance were not raised before the trial court. His Motion for Clarification and Reconsideration, Mr. Aman cited RCW 26.09.090, CP 159-160, and asks the court to consider that it was awarding most of the community property to Mrs. Aman. CP 161.

D. The Law and the Facts Upon Which Respondent Relies Do Not Support Her Argument That the Trial Court Considered the Length of the Marriage in Awarding Spousal Maintenance.

On page 15 of Respondent's Brief, she cites *In re: Nicholson*, 17 Wash. App. 110, 561 P.2d 1116 (1977) to state that "Awards of maintenance of ten years as well as permanent maintenance are routinely

upheld.” Brief of Respondent, p. 15. No such language appears in the *Nicholson* case.

In *Marriage of Nicholson, supra*, at 116, the Court of Appeals upheld an award of spousal maintenance for ten years to a wife who had no employment history except for brief periods of time when she mainly did unskilled work. The *Nicholson* case did not set forth the rule, as asserted by Mrs. Aman, that maintenance awards of permanent maintenance or maintenance for ten years are routinely upheld.

In *Marriage of Nicholson*, the trial court concluded that Mrs. Nicholson’s age, lack of training and qualifications would limit her employment to low-income jobs of uncertain tenure. *Id.* As Mrs. Aman acknowledges, Kathy Reid, the rehabilitation counselor, concluded that, after obtaining a college certificate program or degree, Mrs. Aman could earn an annual income between \$50,309 and \$53,963. Ex. 35, p. 5. Ms. Reid acknowledged that the type of positions for which she believed Mrs. Aman would be qualified, after receiving her education, are generally considered full-time. However, by the time that Mrs. Aman receives her degree, her physical condition could change so that she could become employed on a full-time basis. Ms. Reid’s opinion as to Mrs. Aman’s employability was substantially different from the expectation of the trial court in the *Nicholson* case, where the trial court believed that Mrs.

Nicholson would not have the ability to improve her income earning ability. *Id.*

On page 17 of Respondent's Brief, she concedes that she proposed to the trial court that she receive maintenance of \$8,000 a month for five years, at which time her right to receive future maintenance should be reviewable. Brief of Respondent, p. 17; CP 111. In Section 3.7 of the Decree (CP 104), the trial court struck Respondent's proposed language that "The issue of maintenance shall be reviewed taking into account the wife's then medical condition and employability." However, it retained the language from Exhibit PF – Findings of Fact which, by a hand-written notation, it specifically incorporated by reference into Section 3.7 of the Decree of Dissolution the language that maintenance would be reviewable. Mrs. Aman's argument, contained on page 17 of her Brief, that, "The Decree is the final word on the court's position on this subject," ignores the fact that the trial court specifically incorporated by reference Exhibit PF – Findings of Fact into Section 3.7 of the Decree, creating an ambiguity as to whether or not maintenance is or is not reviewable after five years.

Mrs. Aman's proposal that maintenance would be reviewable in five years was consistent with the analysis of Kathy Reid, contained in Ex.

35, that, within two to four years, Mrs. Aman could obtain sufficient education to allow her to obtain regular employment.

E. Mr. Aman Provided Sufficient Information For the Court to Determine That He Could Not Continue to Work Two Full-time Jobs.

On pages 17 and 18 of Respondent's Brief, Mrs. Aman asked the court to ignore the testimony of Mr. Aman that was summarized on pages 28 and 29 of Appellant's Brief. In that testimony, Mr. Aman described the demands of working two full-time jobs and stated that he would like to leave his job with the Seattle Fire Department because he finds it difficult to fulfill its physical demands. Brief of Appellant, pp. 28-29. Mr. Aman testified that he did not want to continue to work for the Seattle Fire Department (RP, July 8, 2008); that the only reason he continued to work two jobs was to fulfill the financial obligations that the court directed him to pay (RP, July 8, 2008, p. 55), and that his preference would be to continue to work his other job rather than to work with the Seattle Fire Department. RP, July 8, 2008, p. 61. The position of Mr. Aman that he wished to retire from the Seattle Fire Department was not speculation, as Mrs. Aman claims on page 18 of her Brief, but clearly expressed by Mr. Aman in his testimony.

On pages 18 and 19 of her Brief, Mrs. Aman argues, citing *Hilsenberg v. Hilsenberg*, 54 Wash.2d 650, 344 P.2d 214 (1959), that a

court can impose financial obligations on a husband for two years that he may not be able to pay. However, in this case, the court imposed a maintenance obligation for ten years. During the first six years of that period of time, Mr. Aman will have to pay \$6,000 a month as spousal maintenance. To accomplish that objective, he will need to continue to work two jobs, which he finds increasingly difficult as he gets older.

On page 18 of her Brief, Mrs. Aman continues her pattern of making factual statements without citations to the record. She describes no evidence that supports her statements that Mr. Aman's financial declaration overstated his expenses or that he would receive bonuses from Medic First Aid.

F. Mrs. Aman Responds to Arguments Not Made About the Division of Property.

On pages 19 and 20 of her Brief, Respondent appears to argue a position that was not asserted by Mr. Aman in the Brief of Appellant. Respondent seems to believe that Mr. Aman argues that the court erred when it divided the property of the parties on a 60/40 basis. Mr. Aman never made that argument.

On pages 31-37 of the Brief of Appellant, Mr. Aman argued that the court erred when it divided the PowerSaver 401(k) Plan, based on its value at that time, so that Mrs. Aman received \$50,000 and Mr. Aman

received \$56,301.56, then reduced Mr. Aman's award by the amount that the value of the Plan decreased on the date that it was finally awarded by the trial court. See Exhibit 2, Brief of Appellant. The trial court established that the property of the parties should be divided on a 60/40 basis. Therefore, case law cited by Respondent approving an award of two thirds of the community property to a wife are irrelevant.

On page 21 of her Brief, Respondent cites *In re Marriage of Curtis*, 106 Wash. App. 191, 23 P.3d 13 (2001), for the proposition that a court has discretion to determine the date at which it can value an asset. This language is not contained in the case of *Marriage of Curtis, supra*. In that case, the wife asked the court to vacate a property settlement agreement. *Supra*, at 194. The court denied that request. *Supra*, at 198. The issue raised in Respondent's Brief did not arise in that case.

Respondent then cites *In re Marriage of Knutson*, 114 Wash. App. 866, 60 P.3d 681 (2003), to support her argument that Mr. Aman assumed the risk that the 401(k) plan would decrease in value between the date of the entry of the Decree and the date that it was awarded by the trial court in the Order on Motion to Amend Final Orders and Approve Disbursement Calculations. In that case, the Court of Appeals had to determine if a decree which contained a division of property could be vacated based upon the change in circumstances of the market. *Supra*, at

871. Mr. Aman did not seek to vacate an award that was contained in a decree pursuant to CR 60. He asked the trial court to effectuate the 60/40 division of property by having both parties share in the loss to the value of the 401(k) plan. Mr. Aman advised the trial court, in his Motion for Clarification and Reconsideration, CP 154 – 174, that the value of the Plan was decreasing. CP 164. Having put the parties on notice of this event, he should not be penalized because the value of the Plan decreased

IV. CONCLUSION

The trial court did not correctly apply RCW 26.09.080 to award spousal maintenance in this case. It unfairly penalized Mr. Aman for the decrease in the value of his 401(k) plan after Mr. Aman advised the court that the value of the plan could decrease. Mr. Aman asks the court to reverse the award of maintenance that was made by the trial court and direct it to reallocate the 401(k) plan on a 60/40 basis.

Respectfully submitted this 3rd day of March, 2010.


WILLIAM BUCHANAN, WSBA #8864
Attorney for Appellant

DECLARATION OF MAILING

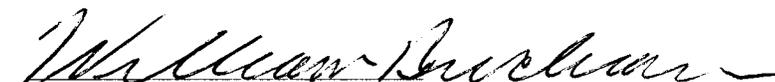
Pursuant to the authority of RCW 9A.72.085, I do certify as true under penalty of perjury under Washington law that on this day I deposited in the U.S. mail, to be sent via certified mail, return receipt requested and postage prepaid, two envelopes. In the first envelope, which I sent by certified mail, return receipt requested and postage prepaid, I placed the original of this document, with all attachments, which was addressed to:

Court of Appeals
600 University St.
Seattle, WA 98101-1176

In the second envelope, which I sent by regular mail, postage prepaid, I placed a true copy of this document, with all attachments, which was addressed to:

Nancy Hawkins
Attorney for Grace Aman
6814 Greenwood Ave .N.
Seattle. WA 98103

Done in Bellevue, Washington, this 3rd day of
March, 2010.


William Buchanan, WSBA No. 8864,
Attorney for Appellant