

63214-1

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NO. 63214-1-I

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

ROBERT E. KOOPS,

Appellant,

v.

CHERYL J. KOOPS,

Respondent.

2009 SEP -9 AM 11:02

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable John Meyer

APPELLANT'S BRIEF

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ORIGINAL

TABLE OF CONTENTS

	Page
I. ASSIGNMENTS OF ERROR	1
A. Assignments of Error	1
B. Issues Pertaining to Assignments of Error	1
II. STATEMENT OF THE CASE	3
III. SUMMARY OF ARGUMENT	13
IV. ARGUMENT	14
A. THE TRIAL COURT ERRED BY ORDERING THE HUSBAND TO PAY MAINTENANCE	14
1. State Law Regarding the Availability of Maintenance	14
2. Standard of Review	15
3. The Trial Court’s Failure to Consider the Factors Listed in RCW 26.09.090 Prior to Awarding Maintenance was an Abuse of Discretion	17
4. The Trial Court Failed to Make Any Findings Necessary for an Award of Maintenance	19
5. The Trial Court Erred by Ordering Maintenance in the Absence of a Showing that the Wife Needed Maintenance and the Husband Had the Ability to Pay	22

a)	<u>The Evidence Clearly Demonstrated the Wife Did Not Need Maintenance</u>	22
b)	<u>The Court Erred by Failing to Explore the Reason for the Wife's Unemployment</u>	27
6.	The Award of Maintenance was Not Just, Given the Wife's Receipt of More Than \$437,000 in Liquid Assets, Including More than \$310,000 in Cash, and the Husband's Medical Condition and Increased Expenses	30
B.	THE WIFE SHOULD BE, AND SHOULD HAVE BEEN, ESTOPPED FROM REQUESTING AND RECEIVING MAINTENANCE AFTER SHE RECEIVED HER SHARE OF THE HOME'S VALUE BEFORE THE COURT- IMPOSED DEADLINE	33
V.	CONCLUSION	35

APPENDIX

Transcript of Trial Court's October 16, 2008 Ruling	A-1 - A-22
Findings of Fact and Conclusions of Law	B-1 - B-6

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Cleaver v. Cleaver</u> , 10 Wn. App. 14, 516 P.2d 508 (Div. I 1973)	22, 27
<u>Coggle v. Snow</u> , 56 Wn. App. 499, 784 P.2d 554 (Div. I 1990)	16
<u>Dakin v. Dakin</u> , 62 Wn.2d 687, 384 P.2d 689 (1963)	27
<u>Dreyer v. Dreyer</u> , 10 Wn. App. 624, 519 P.2d 12 (Div. III 1974)	21, 27
<u>Emrich v. Connell</u> , 41 Wn. App. 612, 623-24, 705 P.2d 288 (Div. I 1985)	34
<u>Endres v. Endres</u> , 62 Wn.2d 55, 380 P.2d 873 (1963)	22
<u>Fox v. Fox</u> , 87 Wn. App. 782, 942 P.2d 1084 (Div. I 1997)	27
<u>Kelso v. Kelso</u> , 75 Wn.2d 24, 448 P.2d 499 (1968)	22, 23, 30
<u>Mansour v. Mansour</u> , 126 Wn. App. 1, 106 P.3d 768 (Div. I 2004)	23, 24, 25
<u>Marriage of Crosetto</u> , 82 Wn. App. 545, 918 P.2d 954 (Div. II 1996)	17
<u>Marriage of Foley</u> , 84 Wn. App. 839, 845-46, 930 P.2d 929 (Div. III 1997)	22, 23, 28

TABLE OF AUTHORITIES (CONT'D)

Marriage of Littlefield,
133 Wn.2d 39, 940 P.2d 1362 (1997) 16, 27

Marriage of Luckey,
73 Wn. App. 201, 868 P.2d 189 (Div. III 1994) 24, 30

Marriage of Matthews,
70 Wn. App. 116, 123, 852 P.2d 462,
rev. denied, 122 Wn.2d 1021 (1993) 17, 18, 19, 28, 29

Marriage of Monkowski,
17 Wn. App. 816, 565 P.2d 1210 (Div. I 1977) 19, 20, 21, 22, 27

Marriage of Mueller,
140 Wn. App. 498, 167 P.3d 568,
rev. denied, 163 Wn.2d 169 (2008) 23, 24

Marriage of Rouleau,
36 Wn. App. 129, 672 P.2d 756 (Div. III 1983) 23

Marriage of Sanchez,
33 Wn. 215, 654 P.2d 702 (Div. III 1982) 28

Marriage of Spreen,
107 Wn. App. 341, 28 P.3d 769 (Div. II 2001) 16, 17

Marriage of Washburn,
101 Wn.2d 168, 677 P.2d 152 (1984) 22, 23, 30, 32

Marriage of White,
105 Wn. App. 545, 20 P.3d 481 (Div. II 2001) 16

Marriage of Wright,
78 Wn. App. 230, 896 P.2d 735 (Div. II 1995) 16, 31

TABLE OF AUTHORITIES (CONT'D)

Marriage of Zahm,
138 Wn.2d 213, 978 P.2d 498 (1999) 17, 31

Morgan v. Morgan,
59 Wn.2d 639, 369 P.2d 516 (1962) 20, 21, 27

Sheffer v. Sheffer,
60 Wn. App. 51, 802 P.2d 817 (Div. I 1990) 30

Wagner v. Wagner,
25 Wn. App. 439, 607 P.2d 1251 (Div. I 1980) 24

STATUTES

RCW 26.09.090 1, 14, 17, 19, 21, 30, 31

RCW 26.09.170(7) 27

I. ASSIGNMENTS OF ERROR.

A. Assignments of Error.

1. THE TRIAL COURT ERRED BY ORDERING THE HUSBAND TO PAY MAINTENANCE.
2. THE TRIAL COURT ERRED BY AWARDING MAINTENANCE WITHOUT SUFFICIENT EVIDENCE TO MEET THE LEGAL STANDARD FOR MAINTENANCE.
3. THE TRIAL COURT ERRED BY FINDING MAINTENANCE SHOULD BE ORDERED IN FINDING OF FACT 2.12.
4. THE WIFE SHOULD HAVE BEEN EQUITABLY ESTOPPED FROM REQUESTING AND RECEIVING MAINTENANCE AFTER SHE AGREED TO ACCEPT MORE THAN \$310,000 IN CASH FROM THE HUSBAND AND THE HUSBAND ACTED IN RELIANCE ON HER AGREEMENT.

B. Issues Pertaining to Assignments of Error.

1. Whether the Trial Court Erred by Ordering Maintenance Without Considering the Factors Required by RCW 26.09.090 and Applicable Case Law? (Assignments of Error #1, 2, 3)
2. Whether the Trial Court Erred by Reversing Its Post-Trial Ruling and Ordering Maintenance Without Making Sufficient Findings or Providing Any Explanation or Rationale for Its Decision? (Assignments of Error #1, 2, 3)

3. Whether the Trial Court Erred by Ordering Maintenance Without Finding the Wife Needed Maintenance and Without Finding the Husband Had the Ability to Pay Maintenance? (Assignments of Error #1, 2, 3)
4. Whether the Trial Court Erred by Ordering Maintenance Where the Wife Received More Than \$437,000 in Liquid Assets, Including \$310,000 in Cash, and Did Not Need Maintenance? (Assignments of Error #1, 2, 3)
5. Where the Husband Acted in Reliance on the Court's Post-Trial Ruling by Refinancing His Home and Paying the Wife More than \$310,000 in Cash in Accordance with the Trial Court's Post-Trial Ruling that Maintenance Would Not be Ordered, Did the Court Err by Reversing Its Decision and Ordering the Husband to Pay Maintenance? (Assignments of Error #1, 2, 4)
6. Whether the Trial Court's Award of Four Years Maintenance to the Wife was Just, Given the Wife's Economic Circumstance, Including Her Receipt of \$310,000 in Cash, and the Husband's Medical Problems and Increased Monthly Expenses? (Assignments of Error #1, 2, 3)
7. Whether the Trial Court Erred by Ordering Maintenance Where the Husband Presented Evidence the Wife Voluntarily Quit Her Job Because of Her Imminent Receipt of More than \$310,000 in Cash? (Assignments of Error #1, 2, 3)
8. Whether Finding of Fact 2.12 is Supported by Substantial Evidence? (Assignment of Error #1, 2, 3)

9. Where the Wife Agreed the Husband Could Refinance the Marital Home Rather than Sell it and Pay Her the Amount Awarded to Her by the Trial Court, and the Husband Acted in Reliance on Her Agreement and Paid Her More than \$310,000 in Cash, Should the Wife Have Been Equitably Estopped from Requesting Maintenance?
(Assignment of Error #4)

II. STATEMENT OF THE CASE.

A. The Marriage.

Robert and Cheryl Koops were married on March 1, 1975 in Skagit County, Washington. CP 174; RP 13, 23. After they married, the Koops purchased a home at 32698 Lyman-Hamilton Highway, located in Sedro-Woolley (hereinafter “the Sedro-Woolley property” or “the marital home”). The down payment was paid for with money Cheryl Koops (hereinafter “the wife”) had received from her previous husband’s life insurance policy. RP 24, 85-86; CP 87. The property, which was located in the Skagit Valley flood plain, was titled in both spouses’ names. RP 29, 87. The Koops later purchased an adjacent nine acres with funds from the insurance settlement. RP 25, 87. The couple also purchased a property in Winthrop, Washington, which they planned to use for their retirement.

Each year from 1984-1996, Robert Koops (hereinafter “the husband”) received a \$10,000 gift from his mother, which he deposited

into a separate account. RP 42, 45. When his mother passed away in 1996, he inherited \$350,000, which he maintained as separate funds. RP 42; CP 88. He later used those separate funds for the benefit of the community. CP 88; RP 42, 44, 106.

During the course of the marriage, the husband used his separate funds for maintenance of and improvements to the marital home. For example, he paid the monthly mortgage payments and property taxes for the Sedro-Woolley property. RP 25, 73. In the late 1990s, he spent a total of \$122,500 of his separate funds to raise the property above the flood plain and make other necessary improvements. CP 88; RP 56-58, 105.

Both spouses paid bills and cared for the home, although the husband handled the bulk of the financial matters related to the property's upkeep. RP 73. Both spouses' separate funds were periodically used for typical expenses. RP 44. The couple resided in the marital home until the wife moved out on July 12, 2007. CP 2; RP 91.

For the first 15 years of the marriage, the wife did not work outside of the home while the husband worked full-time. CP 87; RP 85, 106-07. During the last 20 years of the marriage, and after their separation, both spouses worked full-time outside of the home. RP 84-85.

The Koops acquired various items of personal property during the course of the marriage, including vehicles, furniture, farming equipment, and various other items not at issue in this appeal. See CP 76-77. The couple also acquired various investments, including certificates of deposits, money market accounts, stock brokerage accounts, and life insurance policies. CP 76-77; RP 43-49.

After 32 years of marriage, the wife left the husband on July 12, 2007. CP 42. After the separation, the husband became solely responsible for the maintenance and upkeep of the Sedro-Woolley property, including property taxes, insurance, feeding of and caring for livestock, and everyday property maintenance. RP 53-54. In the summer of 2007, the marital home was listed for sale for \$499,000 in the hope of raising sufficient funds to pay the wife for her share of the property. CP 43. However, it was taken off the market in December, 2007 because no offers were made on the property. RP 135.

B. Dissolution Proceedings.

One day after she moved out, the wife petitioned the court for dissolution of the marriage. CP 1. At the time of trial, the wife claimed a monthly net income of \$1,937.64 and monthly expenses of \$2,598.00. CP

80, 83. The husband had a monthly net income of \$2,836.28 and monthly expenses of \$3,086.48. CP 86, 90. The only issues at trial were property division and the wife's request for maintenance.

The Honorable John Meyer presided over the non-jury trial held on October 14, 2008. A number of exhibits were admitted by stipulation of the parties. CP 107-108 (Exhibit List). Both spouses testified.

In October, 2008, both spouses were 61 years old and contemplating retirement. RP 22, 30, 83, 93; CP 71, 86-87. The husband was employed as a truck driver by Janicki Industries, while the wife was employed as a custodian at United General Hospital. RP 30, 83-84.

The husband suffered from a number of medical conditions; namely, an enlarged heart, diabetes (Type 2 progressing to Type 1), high blood pressure, and a knee that needed replacement. RP 30-31, 58-59; CP 87. Although he planned to retire, he allowed for the possibility that, depending upon the trial's outcome, he might have to continue working part-time to support himself, provided his health did not prevent him from doing so. RP 32.

At the time of trial, the Sedro-Woolley property was owned free and clear, and no monthly payments were due on it. RP 38. The husband

continued to be responsible for the annual taxes and insurance on the property, which were approximately \$3,400 and \$1,350, respectively. RP 38-39. The husband was paying \$869.57 per month for taxes and insurance on the two properties the couple owned, in addition to the costs of daily upkeep and maintenance of the marital home. RP 53-54; CP 90.

The court was apprised through the wife's testimony that she had accrued 768 hours of sick leave and 227 hours of vacation time from her former job with the Sedro-Woolley School District (she had been let go by the school district prior to trial, CP 87). See Exhibit 1. This amounted to approximately 20 weeks of paid time she was owed by her former employer. RP 101-102. She was also due to receive an additional \$550 per month in pension payments from the school district if she began collecting in 2009, as well as an additional \$663 per month in Social Security benefits. RP 111-112.

The court issued its decision on October 16, 2008. 10/16 RP.¹ Although the court had admitted it "ha[d] no idea what the houses are worth," RP 21, it valued the marital home at \$420,000. 10/16 RP at 6. The court ultimately awarded \$655,000 of the total assets to the husband

1. The trial proceedings are cited as "RP." The record of the court's decision is cited as "10/16 RP."

and \$525,000 to the wife. 10/16 RP at 14. This equated to 55% to the husband and 45% to the wife. After deducting the value of the assets awarded to the wife, the husband was ordered to pay \$311,333.00 from the sale of the marital home². Id at 15. The court also required the husband to accept any offer within 90% of \$420,000. Id. The court addressed the issue of maintenance as follows:

I am not requiring maintenance if it sells by January 15th. If it doesn't sell by January 15th, he will commence thereafter paying maintenance in the amount [sic] \$750 per month.

10/16 RP at 15.

The maintenance was to continue “[u]ntil it sells, until it closes.”

Id. The husband’s counsel reminded the court that it would be extremely difficult to sell such a property in three months given the current real estate market. Id. at 17. The judge explained his decision was:

to do something to make sure that he’s really motivated to sell. . . I was just trying to come up at 2 o’clock this morning with some of the best ways I possibly could to make sure he was motivated to sell this.

Id. at 18.

The matter was originally scheduled for presentation of final papers reflecting the court’s decision on November 13, 2008. Prior to that

2. The parties later agreed the correct amount was \$310,828.00.

date, the husband moved for reconsideration, asking the court to reconsider its order that he pay maintenance if he was unable to sell the house by January 15th. CP 109-139.

In the motion, the husband reminded the court of the undisputed fact that the real estate market was “weak at best.” CP 111. The court was informed the husband had contacted a real estate agent named Alice Hanson - which both parties had agreed to as the realtor. *Id.* Attached to the motion was a declaration from Ms. Hanson in which she advised it would be particularly difficult to sell the Sedro-Woolley property due to market instability, the property’s location in a flood plain, uncertainty in the lending market, and the fact that winter was historically the slowest time for sales. CP 134-139. She further advised that similar properties were staying on the market for over 200 days. *Id.* Finally, she suggested a listing price of \$350,000 in the hope of locating a qualified buyer by January 15th. CP 138. This was considerably less than the \$420,000 value the court had placed on the property, and would result in the husband receiving little to no money from its sale after deducting sales costs and the amount the court had awarded the wife; it would also result in him not receiving the amount awarded to him by the court. CP 110-111.

The wife moved for reconsideration of the court's decision on November 18, 2008. CP 140-43. However, no evidence was submitted with the motion and no motion to reopen for additional testimony was made. *Id.* After the motions for reconsideration were filed, the spouses, through their attorneys, agreed that, in accordance with the court's ruling, the husband would refinance the Sedro-Woolley property and pay the wife the amount the court had awarded as her share of the proceeds if the home had sold. CP 159-60. In reliance on the wife's agreement, the husband refinanced the home and liquidated more than one of his CDs, and transmitted \$310,828 to the wife's attorney prior to January 15th. *Id.* This information was provided to the court on February 4, 2009.

On February 15, 2009, the court issued Findings of Fact and Conclusions of Law. Although the matter had been scheduled for presentment four times, the court signed the final papers in chambers. Without prior notice to the parties, the judge substantially altered his ruling. Without taking any testimony or affording the husband the opportunity for cross-examination, he found that "since trial, the wife is unemployed." CP 175 (Finding 2.12). The judge also crossed out the paragraph that had been prepared in accordance with the October 16th

ruling and handwrote "Maintenance should be ordered per the decree herein." Id.

In the Decree of Dissolution, the judge handwrote "Husband shall pay \$500 monthly to the wife as maintenance from 3/1/09 until the month in which wife reaches her 66th birthday." CP 181. This was contrary to his ruling as to the duration of maintenance if the house had not sold by January 15th. The court gave no explanation or rationale for its decision.

The husband filed a motion for reconsideration on the issue of maintenance. CP 189-287. In the motion, the husband reminded the court it had ruled there would be no maintenance if the wife received her share of the property division by January 15, 2009. CP 190. Counsel also reminded the court that its order and setting of the deadline was to motivate the husband to sell the property so the wife would receive her share as soon as possible. CP 191. He reiterated that the wife, through her attorney, agreed the husband could refinance the property, rather than sell it, provided she received her award. CP 192, 268. The bank had only been willing to finance \$198,000, and the husband cashed out some of the CDs awarded to him by the court - with the agreement of the wife and her attorney - to make up the difference. CP 192-93, 268-69. As a result of

the refinance, the husband was required to make monthly mortgage payments of \$1,105.85 per month, plus an additional \$130 per month for flood insurance. CP 193, 269. The husband's counsel advised the wife had quit her job and expressed concern that "[t]he court took no evidence as to why Mrs. Koops was not working and none was offered by her." CP 194.

In addition, the husband submitted a declaration to the court in which he declared the wife "had quit her job and was interested in getting her share of the division of our assets as soon as possible. With her agreement, through her attorney, I looked into refinancing the property in order to get her cash to her." CP 268. He explained that the only reason he made the agreement with the wife to refinance the property was in reliance on the court's ruling that he would not be required to pay maintenance if she received her money by January 15th. Id. at 193, 268-69. As a result of the agreement, and the debt he incurred in order to pay the wife, he was not able to retire as he had planned. Id.

The husband further explained that, even without the \$500/month maintenance, his monthly expenses exceeded his net monthly income by more than \$500.00. Id. at 270. He further advised the court that, because

his employer had stopped allowing overtime, he would be making even less money, assuming he would not be laid off. *Id.* Finally, he reiterated that the wife had voluntarily quit her job because she expected to receive a sizeable amount of money from him pursuant to their agreement. *Id.* at 271.

Without addressing the issue of the reason for the wife's unemployment, and without a hearing of any kind, the court signed an order denying the husband's motion for reconsideration. CP 291-92. No explanation or rationale was provided in the order denying the motion, nor was any rationale provided with respect to the court's failure to provide the husband with an opportunity to be heard on the issue of the reason for the wife's unemployment. *Id.*

III. SUMMARY OF ARGUMENT.

The trial court heard testimony from both spouses and ruled that no maintenance would be ordered if the husband diligently raised the funds to pay the wife for her share of the marital home before January 15, 2009. In accordance with the court's decision, and with the agreement of the wife and her attorney, the husband refinanced the home and paid the wife the amount the court had awarded her prior to January 15th. Despite receiving

more than \$437,000 in liquid assets, and in spite of her agreement with her husband, the wife requested maintenance from the court. Even though the wife had received nearly half a million dollars, and knew the husband had detrimentally relied on the court's ruling and incurred new debts as a result, the court ordered the husband to pay maintenance without considering the factors required by RCW 26.09.090 and case law, without making findings necessary to an award of maintenance, and without the showing required to meet the legal standard for awarding maintenance.

IV. ARGUMENT.

A. THE TRIAL COURT ERRED BY ORDERING THE HUSBAND TO PAY MAINTENANCE.

1. State Law Regarding the Availability of Maintenance.

RCW 26.09.090 sets forth the legal standard for awarding maintenance in a dissolution proceeding and the factors a trial court must consider when determining whether maintenance should be awarded, as well as the amount and duration of any award. The statute provides:

- (1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either

domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

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

2. Standard of Review.

A trial court's decision to award maintenance is reviewed for abuse of discretion. A court's decision is an abuse of discretion if it is manifestly unreasonable or based on untenable grounds or untenable

reasons. It is manifestly unreasonable “if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; 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.” Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A discretionary decision “requires decisionmaking founded upon principle and reason.” Cogle v. Snow, 56 Wn. App. 499, 505, 784 P.2d 554 (Div. I 1990).

With regard to maintenance, the trial court abuses its discretion “if it bases the award or denial of spousal maintenance on untenable grounds or for untenable reasons.” Marriage of Wright, 78 Wn. App. 230, 237, 896 P.2d 735 (Div. II 1995). A trial court commits error when it exercises its discretion “using the wrong reasons.” Marriage of White, 105 Wn. App. 545, 554, 20 P.3d 481 (Div. II 2001); Marriage of Spreen, 107 Wn. App. 341, 349-50, 28 P.3d 769 (Div. II 2001) (“process was flawed” where trial court “relied on other factors” when awarding maintenance).

3. The Trial Court's Failure to Consider the Factors Listed in RCW 26.09.090 Prior to Awarding Maintenance was an Abuse of Discretion.

The trial court possesses the power to order maintenance “after the court properly considers all the statutory factors relevant to such a decision.” Marriage of Zahm, 138 Wn.2d 213, 227, 978 P.2d 498 (1999). A trial court's award of maintenance results from an abuse of discretion where “it does not evidence a fair consideration of the statutory factors.” Marriage of Matthews, 70 Wn. App. 116, 123, 852 P.2d 462, rev. denied, 122 Wn.2d 1021 (1993); Marriage of Spreen, supra, at 349; Marriage of Crosetto, 82 Wn. App. 545, 558, 918 P.2d 954 (Div. II 1996). The statute's language is very clear, and the case law is in accord, that the court must consider the factors. The requirement is mandatory, not discretionary.

In Marriage of Matthews, the court of appeals reversed the award of maintenance because: (1) the trial court suggested the husband had additional income available from moonlighting when there was no evidence he was still moonlighting; (2) the maintenance award did not provide for reduction of the monthly amount after the husband retired, when he would have less income available, meaning he would not have

the ability to meet his needs and financial obligations while meeting the obligations imposed by the trial court; (3) the trial court failed to properly consider the money the wife received from the sale of the family home (\$58,000, subject to a judgment lien in favor of the husband); and (4) the trial court overlooked the effect of the husband's disability or retirement, which would terminate his income stream and require him to pay maintenance out of his remaining retirement or disability income.

Marriage of Matthews at 123-25. The court of appeals characterized the overlooking of the last factor as "not only an abuse of discretion, it is clear error." Id. at 125.

There are striking similarities between Matthews and the present case. Testimony established the husband had significant health problems - specifically, an enlarged heart, high blood pressure, diabetes, and a knee which needed replacement - the combination of which affected his employment and forced him to contemplate retirement. RP 58-59; CP 87. Even though the trial court knew he wished to retire at 62 due to his numerous health problems (and would certainly retire within a few years), would be making less money due to his employer's no overtime policy, and could be laid off, it did not provide for any reduction of payments.

Furthermore, the court overlooked the fact that it awarded his entire retirement to the wife, CP 187-88, meaning he could not even use his retirement payments to pay maintenance, something that was deemed “clear error” in Matthews. Finally, as in Matthews, the trial court failed to consider the extremely large amount of money the wife received in the form of over \$310,000 in cash and another \$126,000 in liquid assets, which was considerably more than the wife received in Matthews.

There is nothing in the record to indicate the trial court considered the factors required by RCW 26.09.090 and the case law. Indeed, the court never even mentioned RCW 26.09.090, much less the factors enumerated therein. Therefore, the maintenance award resulted from an abuse of discretion and should be reversed.

4. The Trial Court Failed to Make Any Findings Necessary for an Award of Maintenance.

Findings of fact “must glean from the record the pertinent facts of the case and thereby resolve conflicting evidence; they must apprise a reviewing court of the legal theories pursued [citation omitted], and must support the conclusions of law.” Marriage of Monkowski, 17 Wn. App. 816, 818, 565 P.2d 1210 (Div. I 1977). Findings of fact which are couched in conclusory language are not sufficient. Id. at 818-19.

In Morgan v. Morgan, 59 Wn.2d 639, 369 P.2d 516 (1962), the Supreme Court reversed the maintenance award, explaining:

[i]t is not clear what the basis was for the trial court's award of alimony. The only 'finding of fact' in support of that award was finding of fact No. 8: 'The court finds that the defendant wife is entitled to alimony, and that the circumstances of the parties justify an award of alimony at the rate of \$150 per month until her remarriage or until further order of this Court.'

Morgan at 643.

In Marriage of Monkowski, this Court also reversed the maintenance award, determining the court's finding was conclusory and legally insufficient:

Wife shall be awarded reasonable maintenance. Reasonable maintenance is the sum of \$1,000 per month for a period of ten years. Husband shall pay to wife maintenance of \$1,000 per month for the next ten years commencing in September of 1975. Conclusion of law No. 7. The finding of fact which allegedly supports that conclusion is couched in identical conclusory language.

Marriage of Monkowski at 818.

In the instant case, the court's finding that "Maintenance should be ordered per the decree herein," CP 175, is even more conclusory than the findings in Morgan and Monkowski, does not refer to one single fact to support it, and does not support a conclusion of law that maintenance is appropriate. Indeed, there are no findings of fact which would support a

legal conclusion that maintenance was warranted. Morgan v. Morgan; Marriage of Monkowski, supra.

In Dreyer v. Dreyer, 10 Wn. App. 624, 519 P.2d 12 (Div. III 1974), the court held the trial court's award could not be affirmed as an award of alimony because "[t]here were no findings of fact concerning the necessities of the wife or the ability of the husband to pay entered in this case." Dreyer at 627-28. The court went on to say the award, if treated as alimony, "was clearly unsupported by the findings of fact and the record." Id.

As explained *supra*, the trial court never set forth any analysis of the factors in RCW 26.09.090 in either its oral ruling or its written orders. There is nothing in either the oral ruling or written orders regarding the wife's need for maintenance or the husband's ability to pay maintenance. Dreyer, supra. Moreover, as explained below, if the court had made a finding that the wife needed maintenance, it would not have been supported by substantial evidence.

A trial court's failure to make findings of fact reflecting whether the trial court considered the required factors and, if so, the facts upon which the court based its decision requires, at the very least, remand.

Marriage of Monkowski at 819. However, as explained below, appellant submits the evidence warrants reversal of the maintenance award.

5. The Trial Court Erred by Ordering Maintenance in the Absence of a Showing that the Wife Needed Maintenance and the Husband Had the Ability to Pay.

a) The Evidence Clearly Demonstrated the Wife Did Not Need Maintenance.

When considering whether maintenance should be ordered, the “paramount concern is the economic condition in which a dissolution decree leaves the parties.” Marriage of Washburn, 101 Wn.2d 168, 181, 677 P.2d 152 (1984). In determining spousal maintenance, “the court 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 (Div. III 1997) (citing Endres v. Endres, 62 Wn.2d 55, 380 P.2d 873 (1963)); Cleaver v. Cleaver, 10 Wn. App. 14, 20, 516 P.2d 508 (Div. I 1973).

The courts have repeatedly held that spousal maintenance “is not awarded as a matter of right. Whether or not it should be awarded depends upon the necessities of the wife and the financial ability of the husband to pay.” Kelso v. Kelso, 75 Wn.2d 24, 27, 448 P.2d 499 (1968);

Marriage of Mueller, 140 Wn. App. 498, 510, 167 P.3d 568, rev. denied, 163 Wn.2d 169 (2008). The public policy in Washington is “[u]nless there is need there should be no alimony.” Kelso at 27.

The law in Washington “mandates that a party seeking maintenance must demonstrate a need for support.” Marriage of Rouleau, 36 Wn. App. 129, 132, 672 P.2d 756 (Div. III 1983). In Marriage of Foley, the court agreed maintenance was not appropriate because the husband “did not demonstrate need” and the wife lacked the ability to pay “given her living expenses and debt obligations.” Marriage of Foley at 846.

Several cases have held maintenance should not be awarded where one spouse received a substantial sum of money from the other spouse. For example, in Marriage of Washburn, the Court concluded that, since the trial court’s award of a lump-sum payment of \$19,000 to be paid over time was, in effect, an award of lump-sum maintenance, the trial court’s order requiring the husband to pay \$1 in maintenance every year was “unnecessary” and reversed the decision. Marriage of Washburn at 183.

In Mansour v. Mansour, 126 Wn. App. 1, 106 P.3d 768 (Div. I 2004), this Court affirmed the trial court’s denial of maintenance because

the wife was to receive assets from the sale of the marital home. Mansour at 16. The opinion reflected the home was sold for \$168,468.64, and the wife was awarded 55 percent of the community asset. Id. at 7.

Likewise, in Marriage of Mueller, supra, this Court upheld the trial court's refusal to award maintenance to the wife because the trial court had awarded her a lump sum of \$496,000. Marriage of Mueller at 510.

Similarly, in Marriage of Luckey, 73 Wn. App. 201, 868 P.2d 189 (Div. III 1994), the court of appeals noted the wife's award of approximately \$200,000 in affirming the trial court's denial of maintenance. Marriage of Luckey at 210. The court also considered the fact that the husband was 61 years old and approaching retirement and was experiencing diminished earning capacity. Id.

Finally, in Wagner v. Wagner, 25 Wn. App. 439, 607 P.2d 1251 (Div. I 1980), rev'd on other grounds, 95 Wn.2d 94, 621 P.2d 1279 (1980), this Court concluded the nature of the payments, which were designated alimony, was ambiguous "when viewed in light of Mrs. Wagner's considerable award of assets, **a fact which suggests that she could have no need for alimony** and that the payments may have been intended as a division of property." Wagner at 444 (emphasis added). Although the

decision was reversed on other grounds, the Court's reasoning regarding the need for maintenance in light of the wife's considerable assets is applicable to the present appeal.

As set forth in Exhibit W to the Decree of Dissolution (CP 187-88), the trial court awarded the wife more than \$500,000 in assets, including \$310,828 in cash, \$126,616 in investments (which could be readily liquidated for cash), plus an additional \$63,813 in the form of the husband's retirement, which could be converted and cashed out. Thus, prior to entry of the final orders, the wife received a minimum of \$437,444, far more than the wife had received in Mansour.

The apparent intent of the court's October 16th ruling was that, if the wife received the \$310,828 by January 15, 2009, or soon thereafter if the property had sold but not closed, she would not need maintenance. This is evidenced by the fact that the court did not order any maintenance from October to January.

Prior to changing the final orders, the court knew the wife had received the \$310,828 from the husband (the husband's submission to the court included deposit slips and correspondence between the parties' attorneys and Exhibit W indicates the money was received), and also knew

the husband had incurred substantial new debt in the form of a new mortgage and flood insurance in order to pay her. In addition, the court knew the wife was owed 20 weeks of paid time by her former employer, RP at 101-02, which amounted to an additional \$17,680. Nevertheless, the court inexplicably ordered him to pay maintenance anyway.

Not only did the court make no finding that the wife had a need for maintenance or that the husband had the ability to pay an additional \$500 for the next four years, see discussion *supra*, the evidence before the court would have directly contradicted a finding that the wife had a need for maintenance. The \$437,444 the wife received prior to entry of the final orders was the equivalent of **168 times** her monthly expenses (not including the interest payable on \$437,444 over four years). It is untenable to suggest or conclude that a person who receives a lump sum payment of more than \$310,000 in cash - plus another \$126,000 in investments and a convertible \$63,000 retirement - with claimed expenses of \$2,600 per month needs an additional \$500 per month in order to make ends meet.

The court never gave any explanation for awarding maintenance, and none is apparent. Thus, the trial court erred by awarding maintenance despite ample evidence that the wife did not need maintenance in addition

to the \$310,828 in cash she received from the husband between the date of trial and date of the final orders. Finding of Fact No. 2.12 is not supported by substantial evidence, and is also legally insufficient. Morgan v. Morgan; Marriage of Monkowski; Dreyer v. Dreyer, supra. For the same reasons, the Decree's Conclusion of Law No. 3.7 is erroneous. The factual finding is not supported by the record, and the facts do not meet the requirement of the correct standard. Therefore, the court abused its discretion. Marriage of Littlefield, supra.

b) The Court Erred by Failing to Explore the Reason for the Wife's Unemployment.

Case law establishes that the fact that one spouse is not employed is not the end of the inquiry into whether maintenance is just and appropriate. It is the policy of this state "to place a duty upon the wife to gain employment, if possible." Cleaver v. Cleaver at 20 (quoting Dakin v. Dakin, 62 Wn.2d 687, 692, 384 P.2d 689 (1963)); see also RCW 26.09.170(7) (an obligor's voluntary unemployment is not a substantial change of circumstances justifying modification of maintenance); Fox v. Fox, 87 Wn. App. 782, 784, 942 P.2d 1084 (Div. I 1997) (absent a showing of good faith, a voluntary reduction in income does not constitute a change in circumstances warranting modification of maintenance).

In Marriage of Sanchez, 33 Wn. App. 215, 654 P.2d 702 (Div. III 1982), the court of appeals upheld the trial court's refusal to award maintenance to the wife, even though the wife was unemployed and suffered from multiple sclerosis. The court reasoned that, because there was no evidence of the disease's progress, and because the wife had not sought similar work after her release from prison (she had been employed in the prison library) and was certain she would receive social security, the trial court correctly refused to award her maintenance. Marriage of Sanchez at 219. In Marriage of Foley, supra, the court of appeals affirmed the denial of maintenance because the trial court determined the husband's assertion that he was unable to work because of a back injury was not true; therefore, he did not demonstrate a need for maintenance. Marriage of Foley at 846.

While the wife's declaration asserted she was no longer employed, the case law makes clear that is not sufficient to justify maintenance and, therefore, would not support a conclusion of law that maintenance is appropriate. Since the wife had a duty to look for work, the reason for her unemployment is important. Unlike her husband, she had no medical conditions that would affect her ability to work. See Marriage of

Matthews at 124 (court noted the trial court did not find the wife had health problems which prevented her from working). The only evidence regarding the reason she was not working was the husband's declaration that she had chosen to quit because she was about to receive a large amount of cash. CP 271.

Ironically, during the trial, the wife's attorney questioned the husband's intention to retire due to his medical problems, telling the court "I don't know if you can just do that in this type of a situation where your wife is working and struggling to meet her monthly expenses. Can you just say I'm going to quit my job and call it quits at age 62, which I don't think he would be very wise to do . . ." RP 9. The irony is that, once the wife was about to receive over \$310,000 from the husband, which he had to go into debt to raise, and when the husband was struggling to meet his monthly expenses, she quit her job.

To the extent that Finding 2.12 - "since trial, the wife is unemployed" - was intended to justify a maintenance award, it is not supported by substantial evidence absent a finding as to why she was not employed and inquiry into whether she made efforts to find similar

employment.³ As the cases cited above establish, the fact that a spouse is not employed is not legally sufficient to demonstrate need. If, as the husband's undisputed declaration stated, she quit because she was about to receive over \$310,000 in cash, then her decision to quit does not justify awarding maintenance. Absent a showing of need, maintenance cannot be ordered. Kelso, supra. The court erred by failing to consider these factors.

6. The Award of Maintenance was Not Just, Given the Wife's Receipt of More Than \$437,000 in Liquid Assets, Including More than \$310,000 in Cash, and the Husband's Medical Condition and Increased Expenses.

An award of maintenance is reviewed for fairness pursuant to the factors set forth in RCW 26.09.090. Marriage of Washburn, supra, at 182. RCW 26.09.090 places emphasis on the justness of the award. Id. Where maintenance is appropriate pursuant to RCW 26.090.090, the requirement that a maintenance award be just acts as a limitation on the amount and duration of maintenance. Marriage of Luckey, supra, at 209; see also Sheffer v. Sheffer, 60 Wn. App. 51, 53, 802 P.2d 817 (Div. I 1990) ("RCW 26.09.090 requires that the court reach a just result in awarding maintenance").

³ The husband was never afforded the opportunity to cross-examine her on this important issue.

However, before the issue of the justness of the award can be addressed, the court must first consider the factors set forth in RCW 26.09.090 to determine if maintenance should be awarded at all. Stated another way, the court must consider the required factors before any maintenance award can be reviewed for justness. See Marriage of Zahm, supra, at 227 (“[b]oth Washington statutory law and case law recognize the power of a trial court to award maintenance to either party **after** the court properly considers all the statutory factors relevant to such a decision”) (emphasis added).

As explained previously, the record demonstrates the trial court did not consider the required factors. Furthermore, the record shows the trial court used the threat of a maintenance award for untenable reasons; namely, to “motivate” the husband to sell the property. That constitutes an abuse of discretion. Marriage of Wright, supra, at 237.

The record reflects the trial judge decided against awarding maintenance, provided the wife received her share of the value of the marital home. It appears he concluded her receipt of more than \$310,000 in cash would obviate the need for monthly maintenance. Nevertheless, in spite of the fact that the wife had received the money from the husband

through the refinancing and cashing out of more than one of his CDs (see CP 187-88), he inexplicably reversed his previous ruling and ordered maintenance on top of the more than \$310,000 cash the wife had just received. He also ordered it to be paid for four years, contrary to his decision that it be payable until the house sold, again without any explanation whatsoever.

As the Supreme Court held in Marriage of Washburn, the primary consideration is the economic condition in which the decree leaves the parties. In the instant case, the decree left Mrs. Koops with over \$310,000 in cash, an additional \$126,000 in liquid assets, and the entirety of Mr. Koops retirement benefits, which testimony established would be an additional \$440 per month, and which could be converted to cash at its value of \$63,813. In addition, she was owed 20 weeks of paid time from the Sedro-Woolley School District, another \$17,680, as well as her own retirement, which was valued at \$16,323. CP 187. In total, she had over half a million dollars.

By contrast, Mr. Koops had new monthly payments of \$1,235.85 for mortgage and flood insurance, CP 269, a reduced income due to his employer's reduction of hours, costs related to his numerous medical

problems, and the usual costs associated with maintaining the properties.

This Court should also consider the fact of the husband's reliance on the trial court's oral ruling when analyzing whether the maintenance award was just. In a criminal case, a party's detrimental reliance acts to bind the other party to its position. Here, it was not just for the court to rule the payment of a sum of money by a certain date meant there would be no maintenance, then order maintenance after the husband acted in reliance on that ruling and paid the wife.

Considering the economic condition the dissolution left the parties in, including the wife's receipt of \$437,444 in cash and liquid assets, the husband's detrimental reliance on the court's ruling, as well as his diminished earning capacity and increased debts, the court's decision to award maintenance was unjust and should be reversed.

B. THE WIFE SHOULD BE, AND SHOULD HAVE BEEN, ESTOPPED FROM REQUESTING AND RECEIVING MAINTENANCE AFTER SHE RECEIVED HER SHARE OF THE HOME'S VALUE BEFORE THE COURT-IMPOSED DEADLINE.

Equitable estoppel is based upon the principle that a person should not be permitted to deny what he or she has once solemnly acknowledged, and is defined as requiring three elements: (1) an admission, statement or

act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. Emrich v. Connell, 41 Wn. App. 612, 623-24, 705 P.2d 288 (Div. I 1985).

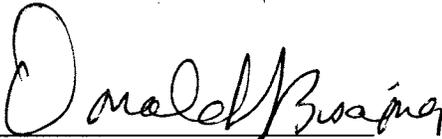
The pleadings reflect the wife agreed to accept the husband's proposal to refinance the home and pay her \$310,828, the amount the court awarded her as her share of the marital home's value, which would obviate the need for maintenance. CP 192-93. 268-69. The husband acted in reliance on her agreement by refinancing the home and liquidating some of his investments to raise the money and forwarded the funds to her attorney prior to January 15th. CP 268-69. As the wife knew, this required the husband to incur a new mortgage debt on the home. After receiving the money, and knowing the import and intent of the court's ruling, the wife still requested an award of maintenance, even though her financial condition had vastly improved with her receipt of an additional \$310,828 in cash, meaning she no longer needed the monthly maintenance. Equity and general principles of fairness should estop her from obtaining an additional monthly windfall after inducing the husband to refinance the

property and incur new debt, as well as liquidate some of his investments, thereby injuring the husband through the agreement and his actions taken in reliance upon it.

V. CONCLUSION.

For the reasons set forth above, the Court should reverse the trial court's award of maintenance.

DATED: September 5, 2009.



DONALD J. BISAGNA
WSBA #7577
Attorney for Appellant

DECLARATION OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that, on September 5, 2009, I mailed a copy of Appellant's Brief to Philip Buri, Buri Funston Mumford, PLLC, 1601 F. St., Bellingham, WA 98225.

Kathleen Bisagna
Kathleen Bisagna, Legal Assistant

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

RECEIVED

IN AND FOR THE COUNTY OF SKAGIT

JUL 14 2009

DONALD J. BISAGHA
ATTORNEY AT LAW

ROBERT E. KOOPS,)
)
Respondent,)
)
v.)
)
CHERYL J. KOOPS,)
)
Appellant.)

CAUSE No.: 07-03-00381-5
COURT OF APPEALS: 63214-1-I

VERBATIM REPORT OF PROCEEDINGS
THURSDAY, OCTOBER 16, 2008
BEFORE THE HONORABLE JOHN M. MEYER

REPORTED BY: DEANNA M. ELLIS,
OFFICIAL COURT REPORTER, CSR No. 2511

Be it remembered that on the 16th day of
October, 2008, the above-entitled and numbered cause
came regularly on for hearing before the Honorable John
M. Meyer for the County of Skagit, State of Washington.

Whereupon the following proceedings were had:

Skagit County Superior Court
In Re the Marriage of Koops and Koops

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MOUNT VERNON, WA

THE COURT: Cause No. 07-3-00381-5, Koops and Koops. This matter came on for trial, and, in fact, it was heard on October 14th. The Court had to take a certain amount of time to review the numbers, and the law, and the like. I also had an in-chambers conversation with counsel yesterday to make sure that we were all at least close to being on the same page.

One more question before I announce my ruling. The only thing on Page 2 of the pre-trial affidavit of petitioner that I understand the petitioner to, in fact, want was the 2000 Volkswagen Beetle.

MR. EVANS: That's correct.

THE COURT: So pretty much everything else is as everything else is.

MR. BISAGNA: She doesn't want a snow mobile or anything, Ken?

MR. EVANS: No.

THE COURT: So the Court will find that the marriage of Cheryl J. and Robert E. Koops is irretrievably broken. That the parties were married on March 1st, 1975, and were separated in July of 2007. There are no minor children born of this relationship. The petitioner is not now pregnant, and at age 61 is

Skagit County Superior Court
In Re the Marriage of Koops and Koops

1 grateful for that fact. That this is a marriage of long
2 duration. Between the marriage and the previous
3 relationship it is very close to 34 years. That the
4 parties brought to the relationship certain separate
5 property.

6 The wife brought \$350,000 of life insurance
7 proceeds from the death of her previous husband. The
8 husband brought \$416,000 of separate property by way of
9 inheritance from various family members, specifically
10 mom and dad. That these assets which started off with a
11 total of \$766,000 have grown over time to assets
12 totaling \$1,180,000. That this marriage was one in
13 which basically -- though the husband was the manager of
14 the community assets totally, the wife basically
15 attributed her assets to the community and trusted the
16 husband to put them into an appropriate form so that
17 they could be used.

18 The husband, likewise, gave his assets to the
19 community, and he was in control, in terms, of what sort
20 of accounts they would be put into -- this is both true
21 as to her and his assets -- and designated what accounts
22 and the names on accounts that the assets went into.

23 By agreement of the parties the wife did not
24 work very much for roughly the first 15 years of the
25 marriage because she was raising children from the

Skagit County Superior Court
In Re the Marriage of Koops and Koops

1 previous relationship and maintaining the family home.
2 And this was agreeable to both, and in many ways was a
3 traditional relationship. After the, after the children
4 were gone, the wife went to work and pretty much
5 maintained employment largely with the Sedro Woolley
6 School District for many years.

7 Both of these people were very hard workers.
8 They worked outside of the home at jobs. They worked on
9 the family home site. They worked a great deal at the
10 family second home and property that was purchased over
11 in Winthrop and both made substantial contributions --
12 in terms of -- from their separate property for the
13 benefit of the community.

14 Though interestingly enough, whereas the wife
15 started off with \$350,000 of separate property, she's
16 now down to \$51,303 of separate property, and the
17 husband started out with 416, and he's now down to 263,
18 so technically the husband benefited a bit more than the
19 wife did from the comparative contributions to the
20 community.

21 The Court has been called upon to characterize
22 property and make a fair and equitable distribution of
23 the property. The Court has taken into consideration
24 many statutory and case law principles for the just and
25 equitable distribution of property, including but not

Skagit County Superior Court
In Re the Marriage of Koops and Koops

1 confined to the duration of the marriage, the nature and
2 extent of the separate property and community property,
3 the economic circumstances of each spouse at the time of
4 division of property in effect, and quite candidly, I
5 cannot speculate what these two people are going to do
6 with their working plans. All I can say is that right
7 now they're working. And, quite frankly, I am unable to
8 find by a preponderance of the evidence that either one
9 of them is going to quit any time soon because they're
10 in large extent waiting to see what happens here, number
11 one. And number two, it really wasn't made clear
12 through the testimony. I have also considered the age
13 and the health and the education and employment history.
14 I have taken into consideration a disparity in earning
15 capacity because I do believe the husband is capable and
16 proven over the years to be capable of earning a better
17 living than the wife.

18 I have taken a look at relinquishment of
19 rights and property, required of property, future
20 earning prospects, just about everything I thought was
21 important under case and statutory law in order to make
22 a decision.

23 I have characterized the property distribution
24 as follows: The residence at 32698 Lyman-Hamilton Road
25 has a fair market value -- and also the record should

Skagit County Superior Court
In Re the Marriage of Koops and Koops

1 reflect that at the request of counsel I have chosen the
2 date of the trial as the date for all of these values,
3 with the exception of two, the Skagit State CDs because
4 the last dates I had on those were November 20th of last
5 year, so I was stuck with those. So the residence at
6 \$420,000.

7 And I'm now -- if this will help you,
8 gentlemen, why don't take a look at the petitioner's
9 community asset sheet because that's the one that I
10 worked off of. CA-2 property on Bryant Road, \$220,000;
11 CA-3 38,313.

12 MR. EVANS: Are you giving us a character of
13 the property?

14 THE COURT: I was just about to do that.
15 Obviously, CA-1 and 2 are community property. CA-3 is
16 husband's separate property. CA-4 is community property
17 at \$36,215; CA-5 is community property of \$39,098; CA-6
18 is husband's separate property at \$44,168.

19 With respect to CA-7, the Court has determined
20 upon further reflection, after our conversation in
21 chambers yesterday, that the sole source of funds for
22 this was the wife's inheritance or the life insurance
23 proceeds, and that the husband paid taxes on this
24 through cash flow, and that was a gift to the community.
25 The character of the account itself remains her separate

Skagit County Superior Court
In Re the Marriage of Koops and Koops

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1 property. That's at 51,303.

2 CA-8, husband's separate property at 10,416;
3 CA-9, husband's separate property at 43,387; CA-10,
4 husband's separate property at 104,225; CA-11 community
5 property at \$63,813; CA-12, community property at
6 16,323; and CA-13, husband's separate property at
7 22,952.

8 Moving to Page 2, husband's CA-14 is husband's
9 separate property at 5,635; CA-15 is husband's separate
10 property at 1850.

11 MR. BISAGNA: 1850, your Honor?

12 THE COURT: Yes.

13 CA-16, husband's separate property at 4250;
14 CA-17, same at 6500.

15 I'm calling these, on page 2, his separate
16 property basically because he wanted them all, and there
17 was not enough evidence for me to individually say which
18 one was community, which one was separate.

19 CA-18 will be her separate property at 7420;
20 CA-19, his at 1500. CA-20, his at 6300; CA-21, his at
21 6000; CA-22, his at 6,000. CA-23, his at 2050; his
22 CA-24, his at 1750; CA-25, his at 2000. CA-26, his is a
23 total of 600; CA-27, his at 2000; CA-28, his at 7,000;
24 CA-29, his at \$10,000; CA-30, his at 1500; CA-31, his at
25 1000; CA-32, his at 1,000; CA-33, his at 1250.

Skagit County Superior Court
In Re the Marriage of Koops and Koops

1 Then sheet 3 that I'm looking at is a separate
2 asset sheet, and I'm going to be awarding her the El
3 Paso property, El Paso, Texas property and him the
4 Burley County, North Dakota property.

5 By my calculations that gives us a total of
6 \$1,179,318 between community and separate of which
7 \$263,461 is his separate. \$51,303 -- I'm sorry, plus
8 7420 for the car is her separate. So give or take, the
9 community is about even, \$160,000, half of which would
10 be \$430,000.

11 Now, here is the thought process that I went
12 through to get this to what I thought was extremely fair
13 and appropriate under the circumstances. I took a look
14 at what they brought to the marriage, took a look at
15 what they have now, and I raised each of their shares by
16 an equivalent amount. So roughly they've got half again
17 as much as they did when they started the marriage. So
18 I have given what I thought to be fair and equitable
19 half again as much as she brought to the marriage to
20 her, and -- plus a little, and half again what he
21 brought to the marriage to him.

22 You were raising your hand, Mr. Bisagna.

23 MR. BISAGNA: I didn't hear you talk about the
24 204,000 that she paid out of that \$350,000 in life
25 insurance for her husband, for the bills of her husband

Skagit County Superior Court
In Re the Marriage of Koops and Koops

1 which was Exhibit 5, I think, in the pleadings. I
2 believe she testified to that, too.

3 MR. EVANS: My recollection is somewhat
4 different.

5 THE COURT: Well mine was, too, but go ahead.
6 What's your recollection?

7 MR. EVANS: My recollection was that, I
8 thought, about 130,000 was paid out from the settlement.
9 The rest was paid from, after they were married. He
10 said it was from community work and wages and things
11 like that.

12 MR. BISAGNA: She testified that was from
13 insurance. I don't mean to interrupt anybody.

14 THE COURT: If I missed a major component of
15 this, I need to know that.

16 MR. BISAGNA: I'm not saying you missed it,
17 but what I'm saying, we provided the probate of the
18 estate which showed that the debts of the estate were
19 \$204,000, and the estate paid \$125,000. Then the year
20 after the marriage, they continued to pay, and Bob was
21 very candid that most of his effort was in labor, and
22 she testified on the stand that, I think Mr. Evans asked
23 her that, most of this \$78,000 that was left paid
24 through by insurance. And I believe she testified yes.

25 That's my recollection of the testimony

1 regarding that 204,000. So the only reason I mentioned
2 that is because you said they both brought equal amounts
3 into the marriage, and I didn't hear anything about the
4 payment of her and her first husband's debts out of the
5 proceeds. I believe also the testimony was that that
6 350,000 was everything that she received from the estate
7 of her husband, as far as money went.

8 In other words, I think you asked, was there a
9 business insurance and personal insurance. I believe
10 she said the 350,000 was --

11 THE COURT: Was all life insurance.

12 MR. BISAGNA: That's what I recall her
13 testifying.

14 MR. EVANS: It was all life insurance. And
15 the difference -- I haven't heard the decision yet, but
16 the difference strikes me as, if you recall her money
17 went into land which increased substantially in value.
18 His money went into accounts which who know --

19 THE COURT: Stayed pretty much the same,
20 increased a little bit.

21 MR. BISAGNA: I just mentioned it because they
22 didn't actually put equal amounts of money into the
23 marriage if you take into consideration the \$204,000
24 that she paid.

25 THE COURT: I guess what I was saying -- yeah.

1 So then the one -- I had looked at that issue, and there
2 was a discrepancy in my notes. What I was thinking was
3 that, yes, the community paid some bills, and some of
4 the money that she brought in definitely went to
5 previous separate bills, but that what comprises over
6 half of the current estate was almost totally paid for
7 by her separate funds. I remember thinking to myself,
8 well, that seems like it's kind of a fair offset.

9 MR. BISAGNA: The testimony also was,
10 regarding the Winthrop property, I believe that he put
11 an equal amount of money into the Winthrop property
12 after the marriage --

13 THE COURT: And after it had been purchased in
14 full by her.

15 MR. BISAGNA: Absolutely, and he also put
16 \$122,000 in raising this \$50,000 piece of property out
17 of the floodplain. And so, so I -- as you -- part of
18 your findings are that they put equal amounts of money
19 into the community property from there separate
20 property.

21 I just wanted to remind you that, yes, the
22 property has increased in value. We didn't give you
23 any -- for the reasons we discussed, we didn't give you
24 any numbers from a realtor, but you do have testimony
25 from both parties. She testified, too, that \$100,000

1 just in raising the property up out of the floodplain
2 was there, plus the siding and the roof.

3 MR. EVANS: There was also testimony or lack
4 of testimony, if you recall. He didn't know what he put
5 into any of these accounts. He didn't know when they
6 were established and how much the initial contribution
7 was to any of these accounts that the Court has
8 designated as separate.

9 MR. BISAGNA: That's not true. As we went
10 through the deposition, Mr. Evans was asking him about
11 the property in Winthrop, and this was a question after
12 the property in Winthrop. He knows very clearly what
13 money was placed in. He testified, he told you the
14 money went into the Skagit State account and then went
15 into the various accounts that were kept separate, so
16 maybe I'm not exactly answering that question.

17 THE COURT: So you feel the community is
18 \$711,000?

19 MR. BISAGNA: I'm sorry, your Honor. Where
20 did that number come from?

21 THE COURT: No. I'm reflecting on what I
22 thought your position was on the size of the community.

23 MR. BISAGNA: I did have that, too. Let's
24 see. My version \$710,600.

25 THE COURT: Was all assets?

1 MR. BISAGNA: No. That was all the community
2 assets. He had 238,507 in separate assets. That did
3 not include most of all the personal property on Page 2.
4 It just included the separate investment assets.

5 MR. EVANS: But Mr. Bisagna's opinion of the
6 community assets was based on different --

7 THE COURT: Yes.

8 MR. BISAGNA: 375 for the home instead of 420,
9 and 175 for the Winthrop property instead of 220, so
10 you've increased the value about 50,000.

11 THE COURT: Five twice.

12 MR. BISAGNA: Five twice, 110.

13 THE COURT: 45 twice, so that would be 90. So
14 that would take it up to around 800. So it's your
15 position, she deserves -- well, if you take 50 percent
16 of the community she would deserve 400-plus whatever is
17 her separate property.

18 MR. BISAGNA: I would not use the word "she
19 deserves," but I would say that 50 percent is \$400,000.

20 THE COURT: Plus, 51,000 --

21 MR. BISAGNA: Plus her Volkswagen.

22 THE COURT: So you were arguing for 460,000.

23 MR. BISAGNA: You -- as I said to you in my
24 closing argument, I'm not, I'm not telling you what
25 percentage to give, but 50 percent is that, but that's

1 not what I'm asking you to do.

2 MR. EVANS: Given -- just to make sure I get
3 my two cents in here. Given all those factors that
4 you've already gone over, my position is that she
5 shouldn't walk out of here with less money than he does
6 after 33 years of marriage.

7 THE COURT: Thank you for calling those things
8 to my attention. Putting this all together, it is the
9 Court's feeling, taken all those factors into
10 consideration, that of the total of \$1,180,000, separate
11 and community, the wife should have \$525,000, and the
12 husband should have \$655,000.

13 The way I propose to do that is that the wife
14 will have CA-4, CA-5, CA-7, CA-11, CA-12, and CA-18. By
15 my calculations that gives her \$213,000 from that,
16 213,667. The balance will come from the sale of the
17 family residence.

18 MR. EVANS: Could you give me that last number
19 again?

20 THE COURT: 213,667. The balance she will get
21 from the sale of the family residence, and there will be
22 a little something left over for him from that.

23 Let me tell you how this sale is going to
24 work. As we discussed in chambers yesterday, this will
25 be listed with an-agreed realtor best suited to sell

1 this property. If that's not an up river person, that's
2 fine. If it's an up river person, that's fine, too. If
3 you folks can't agree, I want you each to tell me who
4 you think it should be, and I'll accept the decision.
5 The, there will be -- the husband is going to be in the
6 house, so he's going to be responsible for maintaining
7 the property until it sells. I am not requiring
8 maintenance if it sells by January 15th. If it doesn't
9 sell by January 15th, he will commence thereafter paying
10 maintenance in the amount \$750 per month.

11 MR. EVANS: Until it sells?

12 THE COURT: Until it sells, until it closes.

13 Now, here's the other thing, I'm not going to let him
14 hold out for a million dollars on this property. So if
15 he gets an offer that's within 90 percent of what I just
16 indicated I feel the fair market value is, he's got to
17 sell, and the wife has to cooperate moving quickly and
18 briskly and coordinating with him to get this done.

19 MR. EVANS: May I ask a question?

20 THE COURT: Sure.

21 MR. EVANS: I compute this at 311,333 as her
22 interest in that residence at this time.

23 THE COURT: That sounds about right.

24 MR. EVANS: Does she get a promissory note
25 secured by a deed of trust?

1 THE COURT: Deed of trust wouldn't be any
2 good, unless she gives it to herself.

3 MR. BISAGNA: You're keeping them as joint
4 account owners of the property until it sells.

5 MR. EVANS: Well, actually, no. If he gave
6 her a promissory note with a deed of trust, she can
7 foreclose on her own deed of trust, take control of the
8 property and sell it, right?

9 THE COURT: Yeah, but am I mean, am I
10 putting -- at what point should that come into play? At
11 what point should she have the right to --

12 MR. EVANS: The reason I'm asking about the
13 promissory note, deed of trust, of course, to see if
14 there is any interest on this money that's basically
15 being awarded to her because all of the assets that he
16 gets are hard assets right now, and hers is not here
17 yet. He's got property in Winthrop. He's got accounts.
18 He's got all these things, what are hard assets.

19 THE COURT: At that three month period, it
20 will start -- that \$311,000 will start gathering
21 interest.

22 MR. EVANS: At what rate?

23 THE COURT: What's the standard rate now?

24 MR. EVANS: About six and a half percent on
25 home mortgages.

1 MR. BISAGNA: You're putting an awful lot of
2 onus on him seemingly to sell this property in this
3 market today, where nobody is selling anything. I think
4 Mr. Evans would guild us with his war story of two years
5 and two hundred thousand dollars less --

6 THE COURT: You're the one that said he wanted
7 to hold out for half a million dollars.

8 MR. BISAGNA: No, Mr. Evans said the property
9 was worth \$499,000.

10 THE COURT: That may have been several months
11 ago. I don't think that was what was being argued in
12 front of me Tuesday.

13 MR. BISAGNA: It absolutely was. If you take
14 a look at his pretrial, you will see it. It says
15 \$499,000. That's exactly what's argued. I'm not trying
16 to cast anything, except he wants a note and deed of
17 trust so that if he doesn't sell it for 420, she just
18 gets it for 311. You want to give him the onus of
19 selling it in the fall, of up river property in the fall
20 and in the winter. If he doesn't sell it within three
21 months, he's got to pay maintenance?

22 THE COURT: I just want to be sure that it's
23 secured.

24 MR. BISAGNA: It's secured.

25 THE COURT: And I also want -- there comes a

1 point where he might say, you know something, at \$750 a
2 month, I can make more money waiting two years to sell
3 this thing when the market gets better or three years
4 because \$750 a month, as we know, is only \$9,000 a year.
5 So that's kind of why I want to do something to make
6 sure that he's really motivated to sell, and she's got
7 to cooperate, too. He's got to cooperate with her. So
8 it's in both of their best interests to sell this
9 property.

10 MR. BISAGNA: It's not really in her best
11 interest if she's has a note and deed of trust for
12 \$311,000 that she can foreclose upon on February 2nd.
13 We also talked about letting her have the house and have
14 all the onus of paying the money to upkeep the
15 property --

16 THE COURT: And if she has -- if it were just
17 the house on a lot, I would seriously consider it.

18 MR. BISAGNA: All I'm saying, maybe I'm just
19 being sensitive as his lawyer.

20 THE COURT: I wasn't saying February 2nd, like
21 he was. I was just trying to come up at 2 o'clock this
22 morning with some of the best ways I possibly could to
23 make sure he was motivated to sell this.

24 MR. BISAGNA: I'm not a real estate lawyer, as
25 you know. Let me put a scenario out there. It's on the

1 market. We agreed to a realtor. The realtor agrees to
2 knock it down whatever amount of money every month or
3 every 90 days or every 6 weeks, and come January 31st,
4 despite their best efforts it's not selling, what do we
5 do then?

6 THE COURT: I'm not assuming it's going to be
7 sold January 31st. I think it might take a year to sell
8 it, so that's why I don't want her to be able to
9 foreclose on it that early.

10 MR. BISAGNA: Okay. Okay, thank you.

11 THE COURT: If there were some way I could --
12 he could come back to me in a year and say, he's not
13 trying to do a darn thing, and you could then respond,
14 yeah, but she's not helping either. I could look at it
15 again, but I don't think I can do that.

16 MR. EVANS: Well, she has total incentive to
17 sell this house because she wants to get this money so
18 she can make the money work at 6 percent which is 18,000
19 a year. He has no incentive whatsoever.

20 THE COURT: At getting 6 percent from him as
21 of January 15th is a heck a lot better than what she can
22 get in a passport account.

23 MR. EVANS: No, I agree. If that's what the
24 ruling of the Court is, she's going to start getting her
25 6 percent January 15th, I understand the incentive.

Skagit County Superior Court
In Re the Marriage of Koops and Koops

1 MR. BISAGNA: Mr. Evans presented this
2 scenario to me and to you. He could have some friend of
3 his come in and lowball the place and call it a
4 legitimate offer when we both thought that -- what would
5 prevent her from bringing some friend in and saying I'll
6 give you \$300,000 for the house?

7 THE COURT: That's why I'm saying it's not my
8 intention it's legitimate, unless it's within 90 percent
9 of what I have valued it at.

10 MR. BISAGNA: Thank you, your Honor.

11 THE COURT: Which is \$378,000. And from
12 everything I hear about that piece of property, if you
13 were to list it for 378 right now, you might be able to
14 get 378.

15 MR. BISAGNA: Thank you, your Honor.

16 THE COURT: That's kind of where I am. Have I
17 missed anything?

18 MR. EVANS: Sum and substance is she's going
19 to get 311,333 out of the house.

20 THE COURT: That's what it looks like.

21 MR. EVANS: Got it.

22 MR. BISAGNA: Thank you, your Honor.

23 THE COURT: That's as fair as I can get,
24 fellas, with what you gave me.

25 MR. BISAGNA: We know we gave you a very hard

1 job to do.

2 THE COURT: Well, yes, but you know something
3 being able to work with you guys to try to make this
4 work out the best and not miss anything is very helpful
5 to me.

6 MR. EVANS: Thank you.

7 **(Whereupon the proceedings concluded this day.)**

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Skagit County Superior Court
In Re the Marriage of Koops and Koops

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STATE OF WASHINGTON)
) ss: CERTIFICATE
)

I, DEANNA M. ELLIS, Official Court
Reporter in and for the County of Skagit do hereby
certify;

That the foregoing is a true and correct
transcript of the proceedings held on October 16, 2008.

In WITNESS WHEREOF, I have hereunto set
my and affixed my official seal this 25th day of June,
2009.



Deanna M. Ellis, CSR 2511
Official Court Reporter,
Skagit County Superior Court

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA
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Superior Court of Washington
County of SKAGIT

In re the Marriage of:

CHERYL J. KOOPS

No. 07-3-00381-5

Petitioner,

Findings of Fact and
Conclusions of Law
(Marriage)
(FNFCL)

and

ROBERT E. KOOPS

Respondent.

I. Basis for Findings

The findings are based on trial on trial on October 14, 2008. The following people attended:

Petitioner.

Petitioner's Lawyer.

Respondent.

Respondent's Lawyer.

II. Findings of Fact

Upon the basis of the court record, the court *Finds*:

2.1 Residency of Petitioner

The Petitioner is a resident of the State of Washington.

1 **2.2 Notice to the Respondent**

2 The Respondent appeared and responded to the petition.

3 The Respondent was personally served on July 17, 2007.

4
5 **2.3 Basis of Personal Jurisdiction Over the Respondent**

6 The facts below establish personal jurisdiction over the respondent.

7 The respondent is currently residing in Washington.

8 The parties lived in Washington during their marriage and they both continue to
9 reside in this state.

10 **2.4 Date and Place of Marriage**

11 The parties were married on 3/1/75 at Skagit County, Washington.

12 **2.5 Status of the Parties**

13 Husband and wife separated on 7/12/07.

14
15 **2.6 Status of Marriage**

16 The marriage is irretrievably broken and at least 90 days have elapsed since the date
17 the petition was filed and since the date the summons was served or the respondent
18 joined.

19 **2.7 Separation Contract or Prenuptial Agreement**

20 There is no written separation contract or prenuptial agreement.

21 **2.8 Community Property**

22 The parties have real or personal community property as set forth in Exhibits H&W.
23 These exhibits are attached or filed and incorporated by reference as part of these
24 findings.

1 **2.9 Separate Property**

2 The husband has real or personal separate property as set forth in Exhibit H. This
3 exhibit is attached or filed and incorporated by reference as part of these findings.

4 **2.10 Community Liabilities**

5 The parties have incurred community liabilities as set forth in Exhibits H&W. These
6 exhibits are attached or filed and incorporated by reference as part of these findings.

7 **2.11 Separate Liabilities**

8 The husband has incurred separate liabilities as set forth in Exhibit H. This exhibit is
9 attached or filed and incorporated by reference as part of these findings.

10 The wife has incurred separate liabilities as set forth in Exhibit W. This exhibit is
11 attached or filed and incorporated by reference as part of these findings.

12 **2.12 Maintenance**

13 The husband indicates he wishes to retire at age 62. He testified that he has numerous health
14 problems, including Type 2 diabetes which is progressing to Type 1 diabetes. He also testified
15 that he may not be able to retire, depending upon the decision of the court in this case. The
16 husband earns more than the wife. He has been employed as a truck driver with Janicki
Industries and earns \$20.01 per hour. His monthly social security benefit will be \$1,200/month,
and the wife's will be \$650/month. The wife will also be getting the husband's pension from
Janicki Industries in the projected amount of \$440.36/month. The husband receives
\$200/month from his North Dakota property.

17 The wife recently changed jobs as a result of being let go from her previous job. She testified
18 that she works as a maintenance worker at United General Hospital, earning \$14/hour, *since that,*
The wife is unemployed.
19 ~~Both of the parties work full time.~~ The wife had indicated she wished to retire at age 62. *John.*

20 The husband turns 62 on October 20, 2008. The wife will be 62 on June 16, 2009.

21 No maintenance is awarded in ~~the~~ ^{this} case given the health of the parties, their nearness to
22 retirement age, and the property awarded which includes \$310,828 to the wife and the
husband's pension of \$61,908, with a projected monthly income of \$440.36.

*Maintenance should be added per the
Decree herein.*

23 **2.13 Continuing Restraining Order**

24 Does not apply.
25

1 **2.14 Protection Order**

2 Does not apply.

3 **2.15 Fees and Costs**

4 There is no award of fees or costs.

5 **2.16 Pregnancy**

6 The wife is not pregnant.

7 **2.17 Dependent Children**

8 The parties have no dependent children of this marriage.

9 **2.18 Jurisdiction Over the Children**

10 Does not apply because there are no dependent children.

11 **2.19 Parenting Plan**

12 Does not apply.

13 **2.20 Child Support**

14 Does not apply.

15 **2.21 Other:**

16
17 This is a marriage of approximately 34 years. The parties have accumulated assets which have
18 grown over time. The husband received \$416,000 by way of inheritance from his mother's
19 estate. The wife contributed proceeds from the death of her former husband to the purchase of
20 the parties' residence at 32698 Lyman-Hamilton Highway, Sedro-Woolley, and the property on
21 Bryan Road, Winthrop, WA. The cost of the Winthrop property was \$18,000 and the down
22 payment on the Lyman-Hamilton residence was \$31,345, the total purchase price being
23 \$50,000. The wife also used her separate funds to purchase the adjacent nine acres. The
24 husband used his separate funds in an equal amount to upgrade both properties. Both those
25 parcels of property were placed in both parties' names.

22 The wife did not work outside of the home during the early years of the marriage as she was
23 raising her children from her previous marriage. During the last 14 years, the wife worked
24 outside of the family home. Both parties were very hard workers and not only worked for wages
25 but spent considerable time working on the family home site and the Winthrop property.

24 Considering the nature and extent of the property, the duration of the marriage, the economic
25 condition in which the parties find themselves at the time the decree of dissolution is entered as

1 well as their age and health and the disparity in the earning capacity which favors the husband
2 as well as all of the other factors set forth in RCW 26.09.080, the court divides the property
3 such that the husband shall receive approximately \$655,000 worth of all of the property,
4 whether community or separate, and the wife shall receive \$525,000 worth of the property,
5 whether community or separate. The values used for the investment accounts are their values
6 on October 13, 2008, except for the certificates of deposit.

7 The property division favors the husband because of the \$416,000 he brought into the marriage
8 from a separate source vs. the wife's contribution of \$350,000, less approximately \$224,000
9 worth of debts paid off from her ex-husband's estate.

10 The court does not feel that the character of the property is as important as the ultimate division
11 which is set forth in Exhibits H & W, and would so divide the property even if the
12 characterization were found to be different.

13 III. Conclusions of Law

14 The court makes the following conclusions of law from the foregoing findings of fact:

15 3.1 Jurisdiction

16 The court has jurisdiction to enter a decree in this matter.

17 3.2 Granting a Decree

18 The parties should be granted a decree.

19 3.3 Pregnancy

20 Does not apply.

21 3.4 Disposition

22 The court should determine the marital status of the parties, consider or approve
23 provision for maintenance of either spouse, make provision for the disposition of
24 property and liabilities of the parties. The distribution of property and liabilities as set
25 forth in the decree is fair and equitable.

3.5 Continuing Restraining Order

Does not apply.

3.6 Protection Order

Does not apply.

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3.7 Attorney Fees and Costs

Does not apply.

3.8 Other

Does not apply.

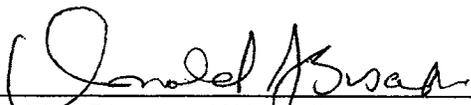
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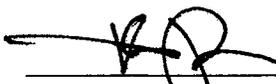
Judge/Commissioner

Presented by:

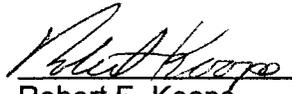
Approved for entry:
Notice of presentation waived:



Donald J. Bisagna, WSBA #7577
Attorney for Respondent



Kenneth J. Evans, WSBA #5611
Attorney for Petitioner



Robert E. Koops


~~Cheryl J. Koops~~
CHERYL J ARGENT-KOOPS