

64429-7

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No. 64429-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

DENNIS FLYNN

Appellant

vs.

SYLVIA FLYNN

Respondent

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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF FACTS	2
	A. Background.....	2
	B. During Their Marriage The Parties Owned A Business That Made Loans To Individuals Secured By Promissory Notes And Deeds Of Trust On Real Properties.	5
	C. While The Parties Were Separating, The Husband Was Arrested And Charged With Possession Of Child Pornography.....	6
	D. The Wife Discovered The Husband Had Been Mismanaging The Community Estate And Diverting Assets To His Girlfriend And Friends.....	9
	E. The Trial Court Awarded The Wife A Slightly Disproportionate Share Of The Marital Estate.....	10
	F. The Trial Court Designated The Mother As The Primary Residential Parent And Reserved On The Issue Of A Residential Schedule Until The Father Completed A Sexual Deviancy Evaluation.....	13
III.	ARGUMENT.....	16
	A. The Trial Court Did Not Abuse Its Discretion In Awarding The Wife A Slightly Disproportionate Share Of The Marital Estate.....	16

1.	The Trial Court Considered The Factors Under RCW 26.09.080, Including The Parties' Economic Circumstances, In Awarding The Wife A Slightly Disproportionate Share Of The Property. (Response to App. Br. 7-8)	17
2.	The Trial Court Did Not Abuse Its Discretion In Considering The Fact That The Wife Was In Need Of Maintenance – An Award Of Which Was Unfeasible Due To The Husband's Current Disability – In Deciding To Instead Award Her More Assets. (Response to App. Br. 12).....	20
3.	The Trial Court Did Not Abuse Its Discretion In Considering The Husband's Economic Misconduct In Awarding The Wife A Slightly Disproportionate Share Of The Assets. (Response to App. Br. 9-10).....	22
B.	The Trial Court's Valuation Of Assets Is Supported By Substantial Evidence. (Response to App. Br. 10, 11, 18-19)	25
C.	The Trial Court Did Not Abuse Its Discretion By Awarding Attorney Fees To The Wife. (Response to App. Br. 17-18)	30
D.	The Trial Court Did Not Abuse Its Discretion In Entering Its Parenting Plan. (Response to App. Br. 14-17).....	33

E.	This Court Should Deny The Husband's Request For Attorney Fees And Instead Award Attorney Fees To The Wife. (Response to App. Br. 20)	39
IV.	CONCLUSION	40

TABLE OF AUTHORITIES

CASES

Chapman v. Perera , 41 Wn. App. 444, 704 P.2d 1224, <i>rev. denied</i> , 104 Wn.2d 1020 (1985)	40
Donovan v. Donovan , 25 Wn. App. 691, 612 P.2d 387 (1980).....	21
Fernando v. Nieswandt , 87 Wn. App. 103, 107, 940 P.2d 1380, <i>rev. denied</i> , 133 Wn.2d 1014 (1997)	36
Leslie v. Verhey , 90 Wn. App. 796, 954 P.2d 330 (1998), <i>rev. denied</i> , 137 Wn.2d 1003 (1999).....	39
Lucker v. Lucker , 71 Wn.2d 165, 426 P.2d 981 (1967).....	26
Marriage of Brewer , 137 Wn.2d 756, 976 P.2d 102 (1999).....	16, 23, 32
Marriage of Burrill , 113 Wn. App. 863, 56 P.3d 993 (2002), <i>rev. denied</i> , 149 Wn.2d 1007 (2003).....	29, 30
Marriage of Crosetto , 82 Wn. App. 545, 918 P.2d 954 (1996).....	22, 32
Marriage of Gillespie , 89 Wn. App. 390, 948 P.2d 1338 (1997).....	25
Marriage of Luckey , 73 Wn. App. 201, 868 P.2d 189 (1994).....	33
Marriage of Mathews , 70 Wn. App. 116, 853 P.2d 462, <i>rev. denied</i> , 133 Wn.2d 1021 (1993)	25
Marriage of Pilant , 42 Wn. App. 173, 709 P.2d 1241 (1985).....	27, 28
Marriage of Rich , 80 Wn. App. 252, 907 P.2d 1234, <i>rev.</i> <i>denied</i> , 129 Wn.2d 1030 (1996).....	30

<i>Marriage of Steadman</i> , 63 Wn. App. 523, 821 P.2d 59 (1991).....	22, 23
<i>Marriage of Swanson</i> , 88 Wn. App. 128, 138, 944 P.2d 6 (1997), <i>rev. denied</i> , 134 Wn.2d 1004 (1998).....	37
<i>Marriage of Wallace</i> , 111 Wn. App. 697, 707-708, 45 P.3d 1131 (2002), <i>rev. denied</i> , 148 Wn.2d 1011 (2003).....	22
<i>Marriage of Watson</i> , 132 Wn. App. 222, 130 P.3d 915 (2006).....	34, 35
<i>Marriage of Woffinden</i> , 33 Wn. App. 326, 654 P.2d 1219 (1982), <i>rev. denied</i> , 99 Wn.2d 1001 (1983).....	25, 33
<i>Parentage of Schroeder</i> , 106 Wn. App. 343, 22 P.3d 1280 (2001).....	33
<i>State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce</i> , 65 Wn. App. 614, 829 P.2d 217, <i>rev. denied</i> , 120 Wn.2d 1008 (1992).....	32
<i>Worthington v. Worthington</i> , 73 Wn.2d 759, 440 P.2d 478 (1968).....	26, 28

STATUTES

RCW 26.09.080.....	16, 19, 22, 27
RCW 26.09.090.....	20
RCW 26.09.140.....	39, 40
RCW 26.09.191.....	14, 33, 35, 36, 38

RULES AND REGULATIONS

RAP 18.1.....	39
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I. INTRODUCTION

After a twenty-year marriage, the trial court awarded the wife 52.5% of the marital estate. The husband, who had been the primary wage earner during the marriage, appeals. Although the trial court recognized that at the time of trial, the husband was receiving disability benefits for a mood disorder that appeared to be triggered by the stress of the parties' litigation and criminal charges against the husband for possession of child pornography, the trial court found that a modestly disproportionate division of the marital estate to the wife was nevertheless warranted. In support of its property division, the trial court considered the length of the marriage, the wife's financial needs, her lower earning capacity, and the fact that husband had "intentionally squandered community assets." (Finding of Fact (FF) 2.12, CP 85; FF 2.21, CP 87)

This court should affirm the trial court's property division as well within its discretion, especially when there was no evidence that the husband's disability was permanent and he testified that he intended to return to work, which would likely earn him greater income than the wife. This court should also affirm the trial court's parenting plan, which designated the wife as the primary residential

parent of the parties' 12-year-old son. The trial court reserved on making a residential schedule until the husband completed a sexual deviancy evaluation. In support of its decision, the trial court found that the husband and son had had no contact for the last two years and expressed its continuing concern over the husband's possession of child pornography and the husband's admitted use of adult pornography in the presence of the son, which it found was not satisfactorily addressed by the parenting evaluator. (CP 92-93) This court should affirm the trial court's decision in its entirety, and award the wife her attorney fees for having to respond to this appeal.

II. RESTATEMENT OF FACTS

A. Background.

Respondent Sylvia Flynn (DOB 11/15/1968) and appellant Dennis Flynn (DOB 11/17/1957) first met when Sylvia was 14 or 15 years old and Dennis was 25 or 26. (See RP 384; CP 72) The parties began dating when Sylvia was 16 or 17 and Dennis was 27 or 28; within a year after they began dating, the parties moved in together. (See RP 22, 798) The parties married approximately five years later in 1989, when Sylvia was 20. (RP 23) Sylvia was 40 and Dennis was 51 at the time of trial. (RP 22; CP 72) The parties

have two children, a daughter born 5/2/1991 and a son, born 7/5/1997, age 12 at trial. (RP 23) Only the son was the subject of the parenting plan at trial. The daughter had recently graduated from high school and was planning on going to a local private college. (RP 23-24) There was no provision in the child support order entered after trial for post-secondary support for the parties' daughter (CP 75), but it was anticipated that Sylvia would likely be the parent who would be responsible to financially assist their daughter. (RP 943)

Sylvia has a high school education. (RP 24) Dennis, who was previously in the military, has a four-year degree in aeronautical science and has a commercial pilot's license. (RP 377-78) Dennis had worked as an airline pilot for Hawaiian Airlines until he was fired when they discovered that he lied on his employment application. (RP 378-79) Thereafter, Dennis worked in the real estate industry in one form or another, and has continued to do so for the last twenty years. (RP 393-94)

By the time of trial, Dennis was unemployed and receiving disability. Dennis claimed that he began feeling disabled in November 2006, a year before the parties separated, when he had

become “unmotivated, disinterested in [his] hobbies, had become lazy, [he] felt lost.” (RP 594) In Spring 2008, the Social Security Administration determined that Dennis was disabled due to “mental devastation,” and predated social security benefits to December 2007. (RP 813-14)

During Dennis’ disability, he traveled to Thailand and Vietnam for pleasure trips. (RP 811) Dennis testified that regardless of his disability: “I could travel anywhere I wanted.” (RP 811) There was no evidence that this disability was permanent, or that Dennis could not become employable in the future. Dennis receives \$1,671 per month in disability benefits. (CP 72) The Social Security Administration also pays an additional \$884 per month directly to Sylvia as support for the parties’ youngest child. (RP 74) With the exception of two payments, Dennis provided no other support for the parties’ children during the separation. (RP 33)

Sylvia worked two jobs during the parties’ separation in order to meet her and the children’s expenses, including the mortgages on the parties’ real properties. (RP 50) Both children lived with Sylvia during the parties’ separation. (RP 27) Dennis had no contact with the parties’ son for nearly two years before trial, and

had limited contact with the older daughter via text messaging. (RP 38-40) In addition to caring for the parties' children, Sylvia worked over forty hours per week as a care team coordinator for a home healthcare company earning \$16.50 per hour. (RP 50-51) Sylvia also worked 3-4 hours a week at United Mortgage, the business that the parties purchased and ran during the marriage, and which Dennis had abandoned after the parties separated. (RP 51-52, 825)

B. During Their Marriage The Parties Owned A Business That Made Loans To Individuals Secured By Promissory Notes And Deeds Of Trust On Real Properties.

The parties purchased United Mortgage in 1994. (RP 147, 408-09) Dennis worked as a loan officer and Sylvia did the books. (RP 410) United Mortgage loaned money to individuals in exchange for a promissory note and deed of trust on their home. (See RP 97-98, 414) In some instances, United Mortgage would assist the borrower in obtaining a better rate by refinancing with a different lender to get another loan, which would be used to pay back United Mortgage with interest. (RP 416-17) In other instances, the parties would wait and foreclose later on the property. (See RP 27, 415)

This proved to be a very successful business for the parties. (RP 412-13) By the time the parties separated, they held several notes/deeds of trust through United Mortgage totaling over \$300,000. (See Ex. 90; RP 27-30) The parties had started foreclosure on three of the notes. (RP 28)

C. While The Parties Were Separating, The Husband Was Arrested And Charged With Possession Of Child Pornography.

In June 2007, the parties began marriage counseling and Sylvia learned soon thereafter that Dennis was having an affair with an employee of their company. (RP 34) That summer, Dennis divided his time equally between the family residence and the parties' beach home in Olalla while the parties were "working on the marriage." (RP 34, 167)

In mid-October 2007, Sylvia discovered child pornography on Dennis' computer in the home where he was residing separately. (RP 34-35) At the time, Dennis was supposedly on a trip to Mexico with a male friend, claiming that "he needed a break, the stress was too much." (RP 36) Sylvia subsequently learned that Dennis in fact was in Thailand. (RP 36) Sylvia found the

travel itinerary for the trip and pictures of Dennis with young Thai girls. (RP 37)

Initially, Sylvia did nothing with the information of what she found on Dennis' computer other than to discuss it with family and friends. (RP 175-78) Eventually, she revealed the information to her counsel, who recommended that Sylvia make a report to the police. (RP 184) It was suggested to Sylvia that if the fact that there was child pornography on Dennis' computer was discovered later by a third party, Sylvia could be considered an accessory and Child Protective Services may be contacted. (RP 184) Around the first of November, Sylvia contacted the police. (RP 35) Dennis was arrested in early November 2007. (RP 35, 185)

When the police arrived at Dennis' home with a search warrant, they found pornography being downloaded onto his computer, including what the Detective referred to as "PTHC" – preteen hardcore. (RP 227, 230, 240-42) The police also found several files on Dennis' computer with child pornography. (RP 248-51, 293-94) The police found "hundreds of videos" of child pornography on Dennis' computer. (RP 253, 293-94) The police also found "trace evidence [of] child pornography-related search

terms on the computer.” (RP 258) At the time of the search, the police also found evidence that Dennis had recently wired \$1,000 to Thailand – he later admitted that he sent money to a woman he met there, for reasons “he can’t remember.” (RP 301, 771-72, 805-06)

Dennis was arrested at the time of the search (RP 292) and charged with Possession of Child Pornography. (RP 35) Sylvia was not involved in the prosecution. (RP 36) Dennis was in the Kitsap County Jail for twenty-four days. (RP 597) Dennis was served with divorce papers while he was in jail, on November 9, 2007. (RP 598)

The criminal charges against Dennis were eventually dismissed. (RP 199, 308) There was evidence that Dennis’ girlfriend, who also used his computer, may in fact have been the one downloading the child pornography. (See RP 538-40, 649, 711) Although it was unclear whether it was the girlfriend or Dennis, or both, who downloaded the child pornography, it was undisputed that Dennis’ computer had substantial amounts of child pornography on it. (RP 248-51, 293-94, 526, 547) A forensic evaluator, who Dennis retained for his criminal defense, and who

reviewed Dennis' computer, described the images as "too horrible to describe." (RP 548)

D. The Wife Discovered The Husband Had Been Mismanaging The Community Estate And Diverting Assets To His Girlfriend And Friends.

While the dissolution action was pending, Sylvia discovered that Dennis appeared to have diverted community assets to his girlfriend and friends. For example, Sylvia discovered that Dennis had conveyed a deed of trust against a rental property owned by the parties to a friend in 2006. (RP 52) While there was evidence that the deed of trust was paid off in 2007, Dennis allowed his friend to record the deed of trust against the property in 2008, and make a demand for payment against Sylvia. (RP 52-53; Ex. 42) On another occasion, Sylvia discovered that, without her knowledge, Dennis assigned two separate deeds of trust owned by the community to the woman with whom he was having an affair. (RP 54-60) Sylvia also discovered that Dennis had released another deed of trust to the borrower even though the community was never repaid for the loan. (RP 642-44)

Dennis made no effort to assist Sylvia with managing their community estate even after he was released from jail. (See RP 31-

33) Sylvia was left alone to try to deal with paying community obligations, including paying mortgages on the real properties owned by the parties. (RP 42-46, 78-93) From the date of separation until trial, Sylvia had paid \$200,000 in community debt, including mortgages. (RP 43) Sylvia also had to pay \$2,600 in unemployment taxes for the community business because Dennis sought and received unemployment compensation at the same time that he was receiving disability benefits. (RP 825-26, 891)

E. The Trial Court Awarded The Wife A Slightly Disproportionate Share Of The Marital Estate.

The parties appeared before King County Superior Court Judge Monica Benton for an 8-day trial. (CP 81) At the conclusion of the trial, the trial court awarded the wife a disproportionate share of the marital estate. In reaching its decision, the trial court considered the fact that this was a 20-year marriage and that the husband had historically been the primary wage earner, compared to the wife who had primarily cared for the children during the marriage. (Finding of Fact (FF) 2.12, CP 85)

The trial court also expressed concern with the husband's "economic misconduct" during the marriage and after separation. (See FF 2.21, CP 87) The court found that the husband had

“intentionally squandered community assets with transfer of community property interest to third parties without [wife]’s consent... [and] [a]s a matter of fairness, [wife] has a right to be reimbursed for the mismanaged community funds.” (FF 2.21, CP 87) The trial court did not find the husband credible, noting that his testimony “was often confused and forgetful, and thereby appearing evasive. His testimony was refuted on cross-examination when presented with documentary evidence that demonstrated he was in error in his handling of community assets, particularly with the myriad of loans he extended with community funds from the community owned business, United Mortgage.” (FF 2.21, CP 88)

The trial court awarded the wife 52.5% of the marital estate and awarded the husband 47.5% of the marital estate:

Asset	Wife	Husband
Family residence	(\$102,270.73) ¹	
Kent rental	(\$30,048.74)	
Tacoma rental	\$167,000.00	
Ollalla residence		\$17,000
Maple Valley property		No value assigned
United Mortgage	No value assigned	
Commercial Building	\$29,255.75	
Deeds of Trust/Promissory Notes	\$31,000.00	\$159,561.53
Bank accounts	\$35,702.00	\$702
Vehicles/Trailers	\$56,850.00	\$12,100
Personal property	\$23,900.00	\$2,000
TOTAL	\$211,388.28	\$191,363.53
	52.5%	47.5%

(CP 59-60, 83-84) The trial court ordered the husband to be entirely responsible for the outstanding community liabilities of \$25,418.78.

(CP 61) The trial court found that this was fair "since Sylvia has already paid more than half of the total community debt, plus met all of the community obligations for expenses such as auto insurance, health insurance for the children, payments on vehicles, etc., Dennis should assume the remaining community debt, listed

¹ The parties owed more on the family residence and Kent rental than they were worth.

above, including the Capital One debt, as it was for his hair plugs.”

(CP 61)

The trial court also awarded attorney fees to the wife in the amount of \$50,000 based on her need and the husband’s ability to pay and his intransigence, which made the case “complex and difficult.” (CP 85, 90)

F. The Trial Court Designated The Mother As The Primary Residential Parent And Reserved On The Issue Of A Residential Schedule Until The Father Completed A Sexual Deviancy Evaluation.

At trial, Sylvia expressed concern about Dennis’ contact with the parties’ son, then age 12. (RP 134-35) Sylvia was concerned about Dennis’ failure to make any effort to connect with Keenan for the last two years, since the litigation started. (RP 135-36) Sylvia described Keenan as a “very emotional child, very quiet, and very sensitive.” (RP 134-35) Sylvia expressed concern that Dennis would speak negatively about Sylvia, which would emotionally harm Keenan. (RP 135) This concern was not without basis, since Dennis had previously texted the parties’ 18-year old daughter referring to Sylvia as “evil” and accusing Sylvia of “framing” him for the child pornography – a claim he has never proved and was largely refuted by his own expert’s testimony that another person,

who was later revealed to be Dennis' girlfriend, had been on his computer and appeared to be downloading child pornography. (RP 134, 538-40) These comments upset the daughter. (RP 134)

The parenting evaluator, who met with both parties and the children, recommended that "Keenan have gradual, therapeutically supported reintroduction with his dad, and that Keenan and both parents receive guidance from that therapist about how to support him in the process." (RP 699) The parenting evaluator believed that the reintroduction should occur over six months. (RP 720) In light of the fact that the child pornography charges were dismissed, and despite the fact that it was undisputed that Dennis' computer contained large quantities of child pornography, the parenting evaluator "put aside [the child pornography issue] as a concern in terms of [Dennis] interacting with Keenan." (RP 700)

The trial court designated Sylvia as the primary residential parent. It placed RCW 26.09.191 limitations on the father's residential time because of "the absence or substantial impairment of emotional ties" between Dennis and Keenan and its concern over the pornography issue. (CP 92) The trial court rejected the parenting evaluator's recommendation for immediate reunification

efforts. The trial court was “not satisfied that Dr. Hutchins-Cook’s report adequately addresses concerns related to Respondent’s possession of child pornography and admitted use of adult pornography in the presence of Keenan. Absent an evaluation by a sexual deviancy evaluator complete with testing, the statutory restriction on mutual decision making, and limitations on residential time cannot be fully addressed. Therefore, the court requires that Respondent undergo a sexual deviancy evaluation.” (CP 92) The trial court stated that “because significant concerns have been raised about Respondent’s judgment, including his use of pornography, and possession of child pornography, pending receipt of the sexual deviancy evaluation ordered above, the court reserves issuing a residential schedule for visitation between the Respondent and Keenan. The court retains jurisdiction over this matter to enter a residential schedule after completion of the sexual deviancy evaluation.” (CP 93)

The husband appeals.

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion In Awarding The Wife A Slightly Disproportionate Share Of The Marital Estate.

Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. *Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999); RCW 26.09.080. “The trial court is in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances.’” *Brewer*, 137 Wn.2d at 769. In light of the trial court’s broad discretion, a trial court’s property distribution will not be reversed on appeal absent a showing of a manifest abuse of discretion. *Brewer*, 137 Wn.2d at 769. Here, the trial court’s disproportionate award to the wife was not a manifest abuse of discretion in light of her financial responsibilities at the end of the marriage, the length of the marriage, the wife’s limited education and work history compared to the husband, and the fact that husband intentionally squandered community assets. (FF 2.12, CP 85; FF 2.21, CP 87)

1. The Trial Court Considered The Factors Under RCW 26.09.080, Including The Parties' Economic Circumstances, In Awarding The Wife A Slightly Disproportionate Share Of The Property.
(Response to App. Br. 7-8)

The husband relies on his "disability" to claim that the trial court did not consider the parties' economic circumstances in dividing the parties' assets. (App. Br. 8) While it was undisputed that at the time of trial the husband was considered "disabled" and was receiving social security benefits, there was no evidence that his disability was permanent. In fact, it appeared from the evidence that the husband's disability was only temporary and situational, related to the stress of the demise of the parties' marriage and the criminal case against him. (See RP 593-95, 602, 647)

The husband testified that he first "experienced the symptoms" of his disability a year before the parties separated, when he was "thinking that [he] didn't want to be with Sylvia anymore." (RP 593-95) After he was released from jail in December 2007, the husband described having "suicidal thoughts... [his] world had flipped upside down. [He] had trust issues." (RP 602) Because the husband had previously been in the armed forces, Veteran Affairs assisted him in applying for

disability benefits. (RP 605) He was approved for benefits in April 2008, but was paid benefits beginning December 2007. (RP 607-08)

The basis for the husband's disability was "mental devastation." (RP 812) There was no evidence that this "mental devastation" would continue after trial. In fact, when questioned about his ability to return to work, the husband testified that he planned on returning to work, but was not "ready" to return to work due to the litigation:

Q: Do you feel at this moment that you're ready to go back to work?

A: No.

Q: Okay. Why is that?

A: Reliving this has been --- it had been pushed out for quite a while. And I really need to get past this. But I plan to go to work.

(RP 647)

Based on the evidence, the trial court could reasonably infer that the husband could, within a reasonable time, return to full-time employment. Because the husband has greater earning capacity than the wife, his economic circumstances would likely improve after dissolution while the wife's economic circumstances would

remain the same if not decline. As the trial court recognized, the husband had been the “primary wage earner” during the marriage, and “is a college graduate.” (FF 2.12, CP 85, *unchallenged*) On the other hand, the wife has only a “high school education and her work during the marriage was secondary to her obligations to care for the parties’ children.” (FF 2.12, CP 85, *unchallenged*)

In awarding the wife more assets, the trial court also properly considered the fact that the wife had made over \$200,000 in payments towards community obligations since separation, in an effort to preserve community assets. (FF 2.10, CP 84, *unchallenged*) Some of those payments were from community assets, but they also were made from the wife’s post-separation earnings and from loans from family, for which she remains responsible. (RP 31-33, 42-44)

The trial court properly considered the factors in RCW 26.09.080, including the length of the marriage – 20 years by the time the decree of dissolution was entered – the wife’s lack of work history, the husband’s greater earning capacity, and his prior breaches of fiduciary duty, when it awarded a disproportionate amount of the community property to the wife. (FF 2.12, CP 85; FF

2.21, CP 87) The trial court's distribution of more of the parties' assets to the wife whose earning prospects are far less and whose family responsibilities are far greater than the husband's after a long-term marriage was not an abuse of discretion.

2. The Trial Court Did Not Abuse Its Discretion In Considering The Fact That The Wife Was In Need Of Maintenance – An Award Of Which Was Unfeasible Due To The Husband's Current Disability – In Deciding To Instead Award Her More Assets. (Response to App. Br. 12)

The trial court did not abuse its discretion in considering the factors under RCW 26.09.090 for spousal maintenance in deciding to award the wife more of the parties' marital assets. The trial court found that the wife has the need for maintenance in light of her limited education, the length of the marriage, and the financial responsibilities associated with the property division for which she will be left responsible, but recognized that the husband was not in a position to pay maintenance:

Maintenance should be ordered because: the parties have a 20 year relationship during which the husband was the primary wage earner. The wife has a high school education and her work during the marriage was secondary to her obligations to care for the parties' children; the husband worked full time until the last year of the marriage. He is a college graduate, and a veteran, who is currently receiving disability benefits based upon a mental illness.

(FF 2.12, CP 85) While the trial court found that spousal maintenance was warranted based on the wife's need, it did not in fact order maintenance because the husband did not have the current ability to pay. (See CP 62) Instead, it awarded the wife a disproportionate share of the community property:

Although the wife has the need for maintenance, the husband does not currently have the ability to pay maintenance to the wife. In lieu of maintenance, the court has awarded the wife a disproportionate share of the community property.

(CP 62) This decision was well within the trial court's discretion, especially in light of the fact that while the husband was "disabled" at the time the decree was entered, there was evidence that he would resume full-time employment in the near future. (See RP 647); *Donovan v. Donovan*, 25 Wn. App. 691, 697, 612 P.2d 387 (1980) (affirming award of maintenance when the supporting spouse was on an uncompensated medical leave of absence at the time of the decree because it was anticipated that the spouse would return to full employment in the near future).

This court should affirm because trial court's consideration of the wife's need for maintenance and the husband's current inability to pay maintenance as a reason to award more of the community

property to the wife was not an abuse of discretion. See **Marriage of Crosetto**, 82 Wn. App. 545, 559, 918 P.2d 954 (1996) (“The trial court was entitled to consider the property division in its determination of maintenance, and to consider maintenance in its property division.”).

3. The Trial Court Did Not Abuse Its Discretion In Considering The Husband’s Economic Misconduct In Awarding The Wife A Slightly Disproportionate Share Of The Assets. (Response to App. Br. 9-10)

RCW 26.09.080 does not limit the court’s ability to consider one spouse’s breach of fiduciary duty to the community in its determination of an appropriate distribution of assets. The “marital misconduct” that a court may not consider is limited to “immoral or physically abusive conduct within the marital relationship.” **Marriage of Steadman**, 63 Wn. App. 523, 528, 821 P.2d 59 (1991); see also **Marriage of Wallace**, 111 Wn. App. 697, 707-708, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). But the court may consider one spouse’s “gross fiscal improvidence” or “squandering of marital assets” in making a fair and equitable distribution of the parties’ assets and liabilities. **Steadman**, 63 Wn. App. at 528. That is precisely what the trial court did in this case.

In ***Steadman***, the husband managed the parties' community business and made decisions regarding the payment of bills, including its tax obligations. 63 Wn. App. at 526. The trial court ordered the husband to pay the business tax liabilities – over three times the liabilities it charged to the wife. ***Steadman***, 63 Wn. App. at 525. Acknowledging that the trial court may consider this type of financial misconduct in dividing property and debts, this court upheld the allocation of debts because it was the husband's "negatively productive conduct,' [which] resulted in the tax liabilities at issue." ***Steadman***, 63 Wn. App. at 528.

The trial court considered this same type of "negatively productive conduct" in this case. The trial court found that the husband "intentionally squandered community assets with transfer of community property interest to third parties without petitioner's consent. This type of misconduct is especially egregious given the respondent's peculiar knowledge of real estate and mortgage lending." (FF 2.21, CP 87, *unchallenged*) While the husband challenges the trial court's consideration of this misconduct in making its property division, he does not otherwise challenge the trial court's factual findings, thus it is a verity on appeal. ***Marriage***

of Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). In any event, there was substantial evidence to support this finding. The husband allowed a friend, his best man at the parties' wedding, to record a deed of trust against real property owned by the parties, when there was evidence that the loan for which the deed of trust was originally executed had already been paid. (RP 52-53; Ex. 42) The husband also transferred two deeds of trust owned by the parties to his girlfriend without the wife's knowledge. (RP 53-60)

Further, there was evidence that the husband claimed to transfer real property in Maple Valley to a friend under the guise of repayment of a loan when in fact the husband retained title to the property in his name. (RP 101-02) The husband complains that the trial court could not have awarded the Maple Valley real property to the husband because "the parties had already disposed of the Maple Valley property before trial, [thus] the property was not before the court." (App. Br. 9-10) But in fact, there was evidence that the Maple Valley property was still titled in the husband's name at the time of trial. (RP 101-02) It was also undisputed that the husband continued to collect rent on the property and pay the mortgage, even after he claimed the property was transferred to his

friend. (See RP 101-02, 459) The trial court clearly found the husband's testimony that he did indeed transfer the property to his friend not credible. The trial court's credibility determination is wholly within the province of the trial court and cannot be challenged on appeal. **Marriage of Woffinden**, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983).

B. The Trial Court's Valuation Of Assets Is Supported By Substantial Evidence. (Response to App. Br. 10, 11, 18-19)

Trial courts have broad discretion in valuing property, and their determination will only be overturned if there has been a manifest abuse of discretion. **Marriage of Gillespie**, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997). If the trial court's finding on value is supported by substantial evidence, its decision will be affirmed. **Gillespie**, 89 Wn. App. at 403. "Whether substantial evidence exists to support a court's finding of fact, the record is reviewed in the light most favorable to the party in whose favor the findings were entered." **Gillespie**, 89 Wn. App. at 404. There is no manifest abuse of discretion if the valuation is within the scope of the evidence. **Marriage of Mathews**, 70 Wn. App. 116, 122, 853 P.2d 462, *rev. denied*, 133 Wn.2d 1021 (1993).

The husband complains of the trial court's valuation of three assets: the family residence in Kent, the residence in Olalla, where he resides, and promissory notes/deeds of trust that he was awarded. (App. Br. 10, 11, 18-19) But there is substantial evidence to support the trial court's findings of fact on the value of each of the parties' assets.

Kent Residence.

There is substantial evidence to support the trial court's finding that the family residence where the wife resides is worth \$679,000. (FF 2.8, CP 82; Ex. 90) While the wife's appraiser testified that the value of the family residence was \$750,000 at the time of trial (RP 443), the wife asked the trial court to value the family residence at \$679,000 because that was the value of the home at the time of separation. (See RP 125, Ex. 90) The wife's testimony on the value of the family residence at separation is "substantial evidence" to support the trial court's finding. A property owner's testimony as to the value of his or her own property is proper evidence of value. *Worthington v. Worthington*, 73 Wn.2d 759, 763, 440 P.2d 478 (1968); see also *Lucker v. Lucker*, 71 Wn.2d 165, 167-68, 426 P.2d 981 (1967) (it is within the trial court's

to determine on which date property should be valued). The trial court was not required to “accept the opinion testimony of experts solely because of their special knowledge; rather, the court decides an issue upon its own fair judgment, assisted by the testimony of experts. A court may reject opinion testimony in whole or in part in accordance with its judgment of the persuasive character of the evidence presented.” ***Marriage of Pilant***, 42 Wn. App. 173, 178-179, 709 P.2d 1241 (1985) (*citations omitted*).

Even if the trial court could not rely on the wife’s testimony as to the value of the family residence, its determination was harmless. It is unchallenged that the obligation owed on the family residence was \$781,270.73. (FF 2.8, CP 82, *unchallenged*) Thus, whether the trial court found the value of the family residence to be \$750,000 as determined by the wife’s appraiser or \$679,000 as the wife asserted, the net value would still be less than zero.

The husband does not challenge the trial court’s decision to award the family residence to the wife, where she and the children reside. See RCW 26.09.080(4) (in distributing property, the court may consider awarding family home to parent with primary care of children). Thus, regardless of whether the trial court adopted the

appraised value over the wife's assertion of value, the wife was awarded an asset with debt greater than its value. "The erroneous valuation of one item in this particular case, does not require reversal of the otherwise fair and equitable distribution of an estate." *Pilant*, 42 Wn. App. at 181.

Olalla Residence.

The trial court's valuation of the Olalla residence at \$237,000 is also supported by substantial evidence. In making its determination, the trial court relied on a recent transaction where the husband sought to sell the residence for \$237,600. (RP 809-10, Ex. 71) The trial court admitted Exhibit 71, which was the purchase and sale agreement for the sale of the Olalla residence at \$237,600 that was signed by the husband and a buyer as evidence of what the husband believed the property was worth. (RP 811) As described earlier, the trial court can rely on a property owner's determination of the value of his or her own property. *Worthington*, 73 Wn.2d at 763. The trial court can also reject the appraisal of an expert witness for purposes of valuing an asset. *Pilant*, 42 Wn. App. at 178-179.

The recent effort by the husband to sell the Olalla residence at a price that he apparently found reasonable was the “substantial evidence” on which the trial court’s valuation is based. Evidence is “substantial” if it exists in a sufficient quantum to persuade a fair minded person of the truth of the declared premise. ***Marriage of Burrill***, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003). “So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.” ***Burrill***, 113 Wn. App. at 868.

Promissory Notes/Deeds of Trust.

The trial court’s valuation of the promissory notes and deeds of trust awarded to the husband based on the face value of the notes came down to a matter of credibility. The husband testified that these notes were “dead,” (RP 783-87), but the trial court simply did not believe him. On appeal, the husband does not challenge that the notes awarded to him were community property that either existed at the time of separation or at trial. Instead, the husband complains that the “evidence was clear that they were all worthless due to borrower default or foreclosure by an earlier mortgageholder.” (App. Br. 19)

But this evidence was not “clear,” because it was based solely on the husband’s testimony, which the trial court found not credible. (See FF 2.21, CP 87-88) Credibility determinations are left to the trier of fact and are not subject to review. **Burrill**, 113 Wn. App. at 868. The role of the appellate court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses. **Marriage of Rich**, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030, 1031 (1996).

In light of the fact that the trial court did not believe the husband’s testimony that these notes and deeds of trust were not collectible, the trial court did not abuse its discretion by relying on the face value of these notes, of which there was substantial evidence, to establish their value.

C. The Trial Court Did Not Abuse Its Discretion By Awarding Attorney Fees To The Wife. (Response to App. Br. 17-18)

The wife concedes that § 3.13 of the Decree of Dissolution is inconsistent with the trial court’s Findings of Fact and Conclusions of Law and the judgment summary of the Decree, in that it states that the husband is ordered to pay \$60,000 of the wife’s attorney fees whereas the judgment, findings, and conclusions of law all

state \$50,000. (*Compare CP 64 with CP 58, 85, 90*) However, this does not require remand as this court should resolve the inconsistency and hold that the attorney fee award is \$50,000, which is apparently the amount intended by the trial court.

This court should otherwise affirm the trial court's award of attorney fees. The husband challenges the trial court's finding that he has the ability to pay the wife's attorney fees. (App. Br. 17-18) But the husband's ability to pay was only one of two bases for the trial court's attorney fee award. The trial court also found that the husband's intransigence warranted an award of attorney fees. (Conclusion of Law (CL) 3.7, CP 90) The trial court found that "the husband's lack of cooperation and denial of facts, some of which were not even in dispute, including his failure to comply with King County Local Family Rule 10, made the trial of this matter more difficult, and placed the burden of demonstrating the truth on a number of issues on the petitioner. This made the litigation in this case complex and difficult, and the petitioner incurred substantial attorney's fees, not only in litigation, but also in enforcing Agreed Temporary Orders that were violated by the respondent." (CL 3.7,

CP 90)² The husband did not assign error to this finding or challenge it in his argument. (See App. Br. 1-2, 17) Accordingly, it is a verity on appeal. **Marriage of Brewer**, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

Regardless of the financial resources of the parties, the court may make an award of attorney fees based on one party's intransigence during the proceeding. **Marriage of Crosetto**, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). Because it is unchallenged that the husband was intransigent throughout the proceeding, it was an adequate basis for an award of attorney fees, and this court should affirm.

There was also an adequate basis for the trial court's determination of the amount of attorney fees awarded. There was evidence that as of the time of trial, the wife had already incurred attorney fees of \$60,000. (RP 137-38) And at the conclusion of trial, the wife had incurred an additional \$20,000. (See RP 940) In total, the trial court awarded the wife \$50,000 of the \$80,000 in

² The finding was denominated as Conclusion of Law but it should be treated as a Finding of Fact. **State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce**, 65 Wn. App. 614, 624, 829 P.2d 217, *rev. denied*, 120 Wn.2d 1008 (1992).

attorney fees that she incurred. This was not an abuse of discretion and this court should affirm.

D. The Trial Court Did Not Abuse Its Discretion In Entering Its Parenting Plan. (Response to App. Br. 14-17)

“In matters dealing with the welfare of children and the provisions of parenting plans, trial courts are given broad discretion.” *Marriage of Luckey*, 73 Wn. App. 201, 208, 868 P.2d 189 (1994). This broad discretion is necessary “because of a trial court’s unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence.” See *Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983). Accordingly, appellate courts are “extremely reluctant” to disturb child placement decisions. *Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (citations omitted).

The husband challenges the trial court’s decision to impose RCW 26.09.191 limitations on his residential time with the parties’ youngest son based on its finding that the husband’s involvement or conduct may have an adverse effect on the children’s best interests because of the existence of “the absence and substantial

impairment of emotional ties between the parent and child.” (CP 92) But this finding is supported by substantial evidence.

The husband at trial admitted that he had not seen or spoken to the parties’ son since November 2 or 3, 2007. (RP 499) He claimed that the reason he had not seen the parties’ son was due to the existence of restraining orders entered in this matter, which prevented him from doing so. (RP 503) However, the wife testified that these orders provided a mechanism for the husband to have contact with the children, but he did not act on it. (RP 209)

The order, which was entered on March 7, 2008, provided that the husband could contact Dr. Wendy Hutchins-Cook to review the matter and provide a recommendation for the residential schedule. (Supp. CP __, Sub No. 23) But even though the husband held the “key” to resume contact with Keenan as soon as the restraining order was entered, he waited one year before he retained Dr. Hutchins-Cook. (RP 712-13) Dr. Hutchins-Cook noted that the husband’s failure to contact her sooner was “significant.” (RP 712)

This case is different than *Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006), cited by the husband. (App. Br. 15)

In *Watson*, after dismissing the mother's petition for modification, the trial court found that while the father did the "most parenting he could" under the restrictive conditions that were placed on him under the temporary parenting plan, it nevertheless imposed restrictions on the father's residential time because of "an absence of substantial impairment of emotional ties between the parent and child." 132 Wn. App. at 227-28, ¶¶ 13-14. The Court of Appeals reversed, holding that any impairment in the relationship between parent and child which resulted from the period of litigation "cannot supply substantial evidence in favor of the RCW 26.09.191(3)(d) restriction." 132 Wn. App. at 234, ¶ 35.

Here, the father, unlike the father in *Watson*, did not do the "most parenting he could" under the circumstances. The father could have started the evaluation sooner, which would have allowed him residential time with the son, and he could have made some level of contact with the son through Christmas or birthday cards or gifts. Dr. Hutchins-Cook commented that the father's decision to delay the evaluation was not in the children's best interests. (RP 713) She further testified that his decision to not initiate any contact with the son on Christmas or his birthday was

“not real understandable.” (RP 713) Under these circumstances, the trial court did not abuse its discretion in imposing RCW 26.09.191 limitations on the father’s residential time.

The trial court also did not abuse its discretion in ordering the father to undergo a sexual deviancy evaluation before residential time could be commenced. The father challenges this requirement on two bases: 1) that the trial court was required to follow Dr. Hutchins-Cook recommendation, which did not require a sexual deviancy evaluation and 2) there was no substantial evidence to support the trial court’s ruling. (App. Br. 14-15, 16) Both claims fail.

First, contrary to the father’s claim, the trial court was not required to adopt the recommendation of the parenting evaluator for immediate re-integration between the father and son without the need of an evaluation. (App. Br. 14-15) The trial court was free to ignore the recommendations of the custody evaluator because they were not supported by other evidence and the court found other testimony, including that of the parties, more convincing. ***Fernando v. Nieswandt***, 87 Wn. App. 103, 107, 940 P.2d 1380, *rev. denied*, 133 Wn.2d 1014 (1997). While the trial court should

consider the recommendation of the custody evaluator, it is not bound by it. **Marriage of Swanson**, 88 Wn. App. 128, 138, 944 P.2d 6 (1997), *rev. denied*, 134 Wn.2d 1004 (1998). The trial court must also weigh the parties' comments and criticisms of the evaluator's recommendations, and make its own assessment of the children's best interests. **Swanson**, 88 Wn. App. at 138.

Here, the trial court expressed concern with the recommendation because it did not find that "Dr. Hutchins-Cook's report adequately addresses concerns related to Respondent's possession of child pornography and admitted use of adult pornography in the presence of Keenan." (CP 92) Thus the court found that "[a]bsent an evaluation by a sexual deviancy evaluator compete with testing, the statutory restriction on mutual decision making, and limitations on residential time cannot be fully addressed. Therefore, the court requires that Respondent undergo a sexual deviancy evaluation by one of the following professionals: Bruce Olson, Ph.D., Gary Wieder, Ph.D., or Jennifer Wheeler, Ph.D." (CP 92) The trial court reserved ruling on a final residential schedule until the evaluation was complete. (CP 92) Notably, even though the trial court once again gave the husband the "key" to

resume contact with his son by allowing him an opportunity to undergo the evaluation before the final parenting plan was entered, the husband still did nothing, blaming his lack of initiative on finances. (RP 1000-01)

Further, the trial court's decision is supported by substantial evidence. The police found several files on Dennis' computer with child pornography, including "hundreds of videos" of child pornography. (RP 250, 253, 293) The police also found "trace evidence [of] child pornography-related search terms on the computer." (RP 258) The husband is wrong when he claims that "forensic evidence established conclusively that Dennis never intentionally possessed child pornography," nor do his citations to the record support such a claim. (App. Br. 16) Further, the parenting evaluator testified that the husband admitted to watching adult pornography while the son was in the room. (RP 695, 718) This evidence was sufficient to support the trial court's decision to impose RCW 26.09.191 restrictions on the father's residential time with the parties' son and to order him to undergo a sexual deviancy evaluation. This court should affirm.

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E. This Court Should Deny The Husband's Request For Attorney Fees And Instead Award Attorney Fees To The Wife. (Response to App. Br. 20)

This court should deny the husband's request for attorney fees because he does not have the need for an award of fees under RCW 26.09.140. The husband has sufficient assets, and more importantly, the earning capacity to pay his own attorney fees. The husband was awarded nearly \$200,000 in assets – slightly less than the amount awarded to the wife.

This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). This court should award attorney fees to the wife because she has the need for her fees to be paid and the husband has the ability to pay in light of the assets awarded to him and his earning capacity, which is significantly greater than the wife's. RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal).

This court should also award attorney fees to the wife based on the husband's intransigence. The trial court found the husband

intransigent and uncooperative, and his actions subsequent to trial and while this appeal has been pending are also intransigent and uncooperative. See **Chapman v. Perera**, 41 Wn. App. 444, 456, 704 P.2d 1224, *rev. denied*, 104 Wn.2d 1020 (1985) (awarding attorney fees to the respondents based on appellants' excessive filing of various motions in the trial court and appellate court while the appeal was pending and because the appeal lacked little merit). The husband did not seek a stay of the trial court's orders, yet he has utterly disregarded the trial court's orders by failing to execute the necessary documents to transfer the assets awarded to the wife, which necessitated a motion by the wife in the trial court. (Supp. CP___, Sub no. 101, 102, 103)

The husband should be ordered to pay attorney fees to the wife under RCW 26.09.140 and based on his refusal to comply with the decree, which he has never sought to stay.

IV. CONCLUSION

This court should affirm the trial court's decision in its entirety as it was made well within its discretion. This court should also award attorney fees to the wife for having to respond to this appeal.

Dated this 2nd day of August, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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DECLARATION OF SERVICE

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

That on August 2, 2010, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Deborah Bianco Deborah A. Bianco, P.S. 14535 Bellevue Redmond Road, Suite 201 Bellevue WA 98007	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Christopher Carney Law Office of Christopher Carney 100 W. Harrison Street, Suite N440 Seattle, WA 98119	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 2nd day of August, 2010.



Carrie Steen