

67128-6

67128-6

NO. 67128-6-I

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

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In re: the Marriage of

TODD K. PARKER,

Appellant,

and

SHERRY M. PARKER,

Respondent.

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**BRIEF OF APPELLANT**

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The Honorable James Doerty

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 NOV -2 AM 10:28

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## INTRODUCTION

Many years before the parties married, Todd Parker built a house on land his parents gave him, using funds they loaned him. Todd deeded the house to his parents during the marriage, eliminating about \$250,000 in debt and allowing the parties to move into a nicer, larger house. Although there was no evidence that Todd gifted the house to the community, the court mischaracterized the house as community property, ruled that Todd breached a fiduciary duty in failing to account for the house's appreciated value, and awarded Sherry a \$205,000 equitable judgment.

The parties deeded Todd's parents investment properties they had given the parties during the marriage, extinguishing a \$498,000 debt attached to the properties. The court found "credible" evidence that the properties had become valueless and found no contrary evidence. Yet the court concluded that Todd breached a fiduciary duty to the community when the parties transferred these debt-ridden, valueless properties.

The court also entered a parenting plan that forces the parties' 14-year-old son to determine whether to have visitation with Todd, contrary to the parenting evaluator's recommendations. This Court should reverse these untenable decisions.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in awarding the \$70,000 promissory note plus interest to Todd, to the extent that deeding the house to the Parkers did not satisfy the note. CP 201, FF 2.11.
2. The trial court erred in finding that the parties' incomes are unlikely to vary substantially in their working lifetime. CP 201, FF 2.12.
3. The trial court erred in finding that the 17-year marriage requires the parties to be placed on an equal economic footing. CP 201-02, FF 2.12.
4. The trial court erred in finding that Todd breached his fiduciary duty to the community. CP 202, FF 2.12.
5. The trial court erred in finding that Todd purposefully transacted community affairs for his benefit and the community's detriment. CP 202, FF 2.12.
6. The trial court erred in finding that Sherry should receive lifetime maintenance in the amount of \$2,000 per month. CP 202, FF 2.12.
7. The court erred in finding that RCW 26.09.090 supports the maintenance award. CP 202, FF 2.12.

8. The trial court erred in finding that Todd breached his fiduciary duty when the parties quitclaimed the investment properties to the Parkers. CP 202, FF 2.12.
9. The trial court erred in finding that Todd was the sole financial manager during the marriage. CP 202, FF 2.12.
10. The trial court erred in awarding Sherry fees. CP 204, 205, 207, FF 2.15.
11. The trial court erred in finding that Todd breached a fiduciary duty when he deeded his former house to the Parkers. CP 204, FF 2.21.
12. The trial court erred in entering the dissolution decree, awarding Sherry an equitable judgment in the amount of \$205,000. CP 207.
13. The trial court erred in entering the dissolution decree, ordering that Todd is liable for the \$70,000 promissory note plus interest to the Parkers. CP 209 ¶ 3.4.
14. The trial court erred in entering the dissolution decree, awarding Sherry maintenance in the amount of \$2,000 per month for the rest of her life. CP 209 ¶ 3.7.
15. The trial court erred in entering a parenting plan, allowing G.P. to decide whether to visit Todd. CP 228 ¶ 3.2.

16. The trial court erred in entering the dissolution decree, awarding Sherry her fees. CP 207.<sup>1</sup>

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court mischaracterize Todd's house as community property, where it is undisputed that Todd built the house before the parties married, using gifted land and borrowed funds, and where there is no evidence that he gifted the house to the community?

2. Did the trial court erroneously find that Todd breached a fiduciary duty to the community when he deeded the house to the Parkers without fully accounting for the house's appreciated value as compared to the attached debt, where (a) the house is separate property; (b) the conveyance extinguished nearly \$250,000 in debt; and (3) the conveyance allowed the parties to move into the Parkers' bigger, nicer home, where the parties lived for six years often without paying rent?

3. Did the court erroneously award Sherry an equitable judgment for \$205,000 – half of the house's 2005 value – based on: (1) its mischaracterization of the house as community property; and

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<sup>1</sup> Todd does not believe it is necessary to assign error to the trial court's memorandum decision, as it does not contain Findings. To the extent that this Court determines otherwise, Todd assigns error to any findings in the memo.

(2) its incorrect finding that Todd breached a fiduciary duty to the community?

4. In light of the court's correct ruling that there was credible evidence that the community's investment properties were valueless and that no evidence would allow the court to assign a net value to the properties, did the trial court erroneously find that Todd breached a fiduciary duty to the community when the parties transferred the valueless investment properties to the Parkers, extinguishing a \$498,000 community debt?

5. Did the trial court erroneously award Sherry \$2,000 per month lifetime maintenance, where the court failed to consider the statutory factors and erroneously concluded that Todd breached a fiduciary duty when the parties transferred debt-ridden, valueless investment properties?

6. Did the trial court erroneously enter a parenting plan allowing 14-year old G.P. to decide whether to have visitation with Todd, where (a) G.P. wanted visitation with Todd and never asked for visitation to be discretionary; and (b) the parenting evaluator opined that G.P. should not be put in the position of making such a difficult decision?

7. Should this Court reconsider the fee award, which is based in part on the trial court's erroneous rulings?

### **STATEMENT OF THE CASE**

Todd and Sherry Parker divorced in April 2011 after a 16-year marriage. CP 1-2, 206-11.<sup>2</sup> Following a three-day trial, the trial court found that Todd was not credible, where he failed to provide documents or other data establishing the value of his home and the parties' investment properties. CP 125-26. While Todd disagrees with this credibility determination, he does not challenge it, respecting that this Court does not review such determinations. *In re Estate of Haviland*, 162 Wn. App. 548, 558, 255 P.3d 854 (2011). The following facts are taken from other witnesses, or are undisputed.

**A. Before the parties married, Todd borrowed money from the Parkers to build a house on land they gave him.**

Todd's parents, Luther and Marlene Parker ("the Parkers"), gifted him a piece of property in 1978. RP 68-69; CP 1. In 1985, Todd borrowed \$70,000 from his parents to build a house on the property. RP 69-70; CP 129. He signed a promissory note,

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<sup>2</sup>This brief refers to the parties by their first names to avoid confusion. No disrespect is intended.

promising to pay the principle plus 12.5% annual interest in thirty years. RP 69, 99; Ex 20.

The Parkers purchased several pieces of investment property beginning in 1987. RP 261. They gave Todd an interest in the properties before the marriage. RP 66-67.

Todd and Sherry began dating when Todd was building his home, and moved in together in 1987 or 1988, one year after he finished. RP 292-93, 374. They became engaged around 1990, but Sherry got “cold feet.” RP 294. They reunited around 1992, and married in November 1993 – eight years after the Parkers loaned Todd the money for his house, and six years after they began gifting him the investment properties. RP 66, 68-70, 261, 294.

The parties entered a prenuptial agreement, identifying Todd’s house and his interests in the investment properties as his separate property. Ex 21 at 11, 15-24.<sup>3</sup> Sherry recalled the attorney “read through” the document before she signed it. RP 295.

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<sup>3</sup> Todd does not appeal from the findings that the prenuptial agreement is unenforceable. CP 200, FF 2.7.

When they married, Todd owed his parents \$140,000 on the loan for his home. Ex 20 (\$70,000 principle + 12.5% interest for 8 years). He also owed them about \$18,000 on the investment properties. RP 67.

**B. Todd transferred his house to the Parkers to pay off the promissory note.**

Sherry acknowledged that the home Todd built was “his” house. RP 318. The parties lived in Todd’s home for over 12 years, never making a single payment on the promissory note. RP 349-50; CP 86, 98. They had no mortgage, and there is no indication that they had other significant housing costs.

In 2005, Sherry decided that she needed a larger house. RP 100-02, 349-50. The Parkers wanted to move from their 3,000 square-foot house, adjacent to Todd’s house. RP 264-65, 349-50, 369. The parties could not afford the Parkers’ house, but approached them hoping to work something out. RP 100-01, 264-65.

Todd and Sherry quitclaimed Todd’s house to the Parkers in June, 2005, moving into the Parkers’ house. RP 264-65; Ex 38.<sup>4</sup>

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<sup>4</sup> Although Sherry is not on title, she signed the deed conveying Todd’s house to the Parkers because the parties were married and “thought that was the thing to do.” RP 104-05.

Although the deed states that consideration was “love and affection,” the property transfer paid off the \$244,017.12 promissory note plus interest. RP 70, 99-102, 264-65; CP 98; Ex 38. The parties were supposed to pay the Parkers \$1,000 rent per month, but often did not. RP 143-44, 264-65. When they did not pay rent, Todd provided “sweat equity” for the Parkers’ developments. RP 265.

**C. The Parkers gave the parties an interest in some investment properties, but the parties deeded the interest back after the properties lost all value.**

During the parties’ marriage, the Parkers purchased several more investment properties in Kittitas County. RP 105-06, 261. The Parkers paid all up-front costs, giving Todd and Sherry an interest in the properties, with the understanding that Todd and Sherry would pay 50% of the costs and receive 50% of the profits when the properties sold. RP 106-07, 237-39, 261. Todd and Sherry owed the Parkers \$498,000. RP 270-71; Ex 41.<sup>5</sup>

These properties had become valueless and impossible to sell. RP 108-11, 263-64; CP 128. In 2007 or 2008, Kittitas County enacted a water moratorium affecting the investment properties. RP 108-09, 273-74. Under the moratorium, the only way to get

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<sup>5</sup> This exhibit was admitted for illustrative purposes. RP 267.

water from an existing well, or to drill a new well, was to pay \$10,000 to apply for water. RP 108-09. The process can take up to five years, and there is no guarantee you would “even get a drink.” RP 109-10, 266, 273-74.

Complicating this dire situation further, Suncadia, a nearby resort, owned the water rights on the investment properties. RP 109, 273-74. Coupled with the economic downturn, the water moratorium completely devalued the properties, which are now nothing more than “camping lots.” RP 109-11, 263-64.

The properties were less than valueless to Todd and Sherry, who owed the Parkers \$498,000 for their share of development costs. RP 270-71; Ex 41. Faced with this staggering debt on worthless properties, the parties quitclaimed their interest to the Parkers in April 2008. RP 272, 280-81; Exs 6-18, 25-26, 35. They also quitclaimed Todd’s separate property interest in the investment properties the Parkers gave him before the marriage. RP 280. These transfers extinguished the parties’ half-million-dollar debt. RP 111-13, 272, 280-81.

Luther Parker understood that the deeds transferred title to the Parkers. RP 268, 270. As such, he did not immediately record the deeds to avoid paying filing fees and 2% of the purchase price,

apparently referring to excise taxes. RP 268. He recorded the investment-property deeds in December 2010 and recorded the house-deed in January 2011, after Sherry sought the properties in the divorce. RP 270; Exs 6-18, 25-26, 35, 38.

**D. The marriage deteriorated as the parties fought over finances and Sherry's acrimonious relationship with the parties' daughter worsened.**

The parties' frequently argued over finances, and Sherry, who has been treated for alcohol abuse, started drinking again. RP 33-34, 301-02, 323. The parties' daughter K.P. claimed that Sherry became violent when she drank, alleging that Sherry once slapped her and pulled her hair. RP 18-19. Todd received reports that Sherry drove while under the influence with the children in the car. RP 212, 383, 388. K.P., who was "very upset" with Sherry and "had a lot of anger and hurt," blamed herself for Sherry's "abuse" and "drinking problem." RP 18-19, 38-39.

**E. Procedural History.**

Todd petitioned for dissolution in December 2009. CP 1-5. After the three-day trial, the court asked the parties to submit additional evidence on how much Todd's house had appreciated during the marriage. RP 395-99. Todd presented evidence that the house was worth \$216,800 when the parties married in 1993,

and \$411,000 when they transferred it to the Parkers in 2005. CP 86, 91-92. Sherry did not contest these values, providing a comparative market analysis showing that the property was worth \$368,000 in 2011. CP 100-15.

The court found that the 17-year marriage required the court to place the parties on an equal economic footing. CP 201-02, FF 2.12. Todd grossed \$5,880 per month working as a carpenter, and Sherry grossed \$1,175, working part-time. CP 201, FF 2.12; RP 146-47, 325. The court ordered Todd to pay \$250 monthly for Sherry's car loan and \$2,000 per month lifetime maintenance. CP 126-27; 201-02, FF 2.12; CP 209.

The court's lifetime-maintenance award is based in large part on its finding that Todd breached a fiduciary duty to the community, failing to adequately document the parties' transfer of their investment properties to the Parkers. CP 127-28; 201-02, FF 2.12. The court also found that the investment properties were valueless, due to the depressed economy and the water moratorium. CP 128. The court nonetheless ordered lifetime maintenance, explaining that transferring the valueless assets to the Parkers had depleted the community of assets the court could otherwise have awarded Sherry. CP 128; 202, FF 2.12.

The court ruled that Todd gifted his former home to the community and that he breached his fiduciary duty when the parties deeded Todd's house to the Parkers. CP 128-29; 204, FF 2.21. The court reasoned that (1) Luther Parker recorded the deed 13 days before trial; and (2) Todd failed to make a precise accounting, testifying only that "we" owed the Parkers a lot of money. CP 128.

The court divided 50/50 the house's 2005 value – \$411,000 – awarding Sherry \$205,000 plus 12% interest, as an equitable judgment. CP 129, 207. Despite characterizing the house as community property, the court found that the promissory note plus interest was Todd's separate debt. CP 129; 201, FF 2.11; Ex 20. The court refused to offset Sherry's equitable judgment with any portion of the debt. CP 129. The court divided any other cash assets equally between the parties. CP 129, 208 ¶ 3.2 & 3.3.

The trial court adopted parenting evaluator Kathleen Kennelly's recommendations, ordering that the parties' 16-year-old daughter K.P. live with Todd and choose whether to have visitation with Sherry. CP 126, 228 ¶ 3.2. The court ordered that the parties' 14-year-old son G.P. live with Sherry, and choose whether to exercise visitation with Todd, contrary to Kennelly's recommendation that G.P. was too young to make such a decision.

*Id.* The court cited “the fairness issue in the context of the alienation” (presumably of Sherry). CP 126.

The court entered final orders in April 2011, entering findings and conclusions based on its memorandum decision. CP 199-205, 206-36. The court ordered Todd to pay Sherry’s attorney fees. CP 130, 205, ¶ 3.7. The trial court denied Todd’s motion for reconsideration. CP 237-47, 248. Todd timely appealed. CP 249-52.

## ARGUMENT

### A. Standards of review.

The trial court must “have in mind” the correct character of the parties’ assets before distributing them in a dissolution. *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999); *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977); RCW 26.09.080. This Court reviews *de novo* the trial court’s property characterizations. *In re Marriage of Mueller*, 140 Wn. App. 498, 503-04, 167 P.3d 568 (2007). The Court will reverse a property mischaracterization if “(1) the trial court’s reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in

the same way.” *In re Marriage of Shui*, 132 Wn. App. 568, 586, 125 P.3d 180 (2005).

This Court will reverse findings that are not supported by substantial evidence, sufficient to persuade a fair-minded person that the matter asserted is true. *In re Marriage of Bernard*, 165 Wn.2d 895, 903, 204 P.3d 907 (2009). This Court reviews the trial court’s distribution of assets for an abuse of discretion. *In re Marriage of Rockwell*, 157 Wn. App. 449, 452, 238 P.3d 1184 (2010).

**B. The trial court mischaracterized Todd’s former home requiring reversal.**

Eight years before the marriage, Todd built his former home on gifted land and borrowed funds. Sherry did not claim that Todd gifted this house to the community and there is no evidence of a gift.<sup>6</sup> Yet the court concluded that Todd gifted the house to the community. CP 129.

This mischaracterization lead to two more incorrect conclusions: (1) that Todd breached a fiduciary duty to the community when he deeded the house to the Parkers, failing to account for the house’s appreciated value as compared to the

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<sup>6</sup> Sherry did not argue that the house was comingled, and the court did not address comingling. CP 125-30, 199-205.

attached debt; and (2) that Sherry was entitled to a \$205,000 equitable judgment – half of the house’s value. *Id.* It is doubtful that the trial court would have reached either of these erroneous conclusions if it had properly characterized the house as Todd’s separate property. This Court should reverse.

**1. Todd’s former home was his separate property until he transferred it to the Parkers.**

Separate property includes all property acquired before marriage. RCW 26.16.010; *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). The courts must “presume[]” that property that is once separate remains separate unless there is “*direct and positive evidence to the contrary*”:

[T]he right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character *until some direct and positive evidence to the contrary is made to appear.*

*Chumbley*, 150 Wn.2d at 6 (emphasis original) (quoting *In re Dewey’s Estate*, 13 Wn.2d 220, 226-27, 124 P.2d 805 (1942) (quoting *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911))). This Court has held that if one spouse intends to convert his separate property to community property, then his intentions “must

be evidenced by a writing.” *In re Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P.2d 8 (1989).

It is undisputed that Todd’s former house was his separate property – Todd built the house on gifted land and borrowed funds eight years before the marriage. *Shannon*, 55 Wn. App. at 140 (purchasing a house before marriage with separate funds establishes that the house was separate property when acquired); RP 68-69, 99, 374; Ex 20. Sherry never testified that Todd intended to give the community all or any part of the house. She was not on title, and she signed the deed conveying the house to the Parkers only because the parties were married and “thought that was the thing to do” as they both agreed to convey it to the Parkers. RP 104-05. Sherry never testified otherwise. Sherry acknowledged that the house belonged to Todd. RP 318.

The trial court based its decision that the house was community property on its mistaken belief that Todd “persistently” testified that “we’ owed [the Parkers] that money and the interest” and that “we owed them (his parents) a lot and decided to give them back the property.” CP 126, 128. But the trial court was mistaken about Todd’s testimony. RP 61-112, 127-260.

When the court asked Todd if the Parkers had loaned both of the parties the funds to build the house, Todd unequivocally responded “[n]o.” RP 230. Todd borrowed the money and received the land many years before he and Sherry first started dating. RP 69-70, 293. Sherry never disputed these facts, agreeing that Todd was building the house when they started dating and that the house was “his.” RP 292-93, 318, 374. Todd once stated, “we owed them a lot of money,” but then stated “I owe my parents a lot of money.” RP 100. Using “we” one time in reference to the debt on the house is not sufficient evidence to support the court’s finding that Todd gifted the house to the community.

But even assuming *arguendo* that Todd’s casual use of the marital “we” indicated his intent to gift the house to the community, the character of the house would change only if Todd’s intent had been manifested in a deed or some other writing. ***Shannon***, 137 Wn. App. at 140. None exists.

Finally, the trial court’s memorandum decision also mistakenly suggests that invalidating the prenuptial agreement altered the house’s separate-property character. CP 128-29. The house’s separate character has nothing to do with the prenuptial

agreement – it was separate property because Todd acquired the land and funds used to build the house before the marriage, and because there is no “*direct and positive evidence*” that he converted the house to community property. **Chumbley**, 150 Wn.2d at 6 (emphasis in original); **Shannon**, 55 Wn. App. at 140. If the unenforceable prenuptial agreement has any relevance, it reaffirms that the house was separate property because it was acquired before marriage. Ex 21 at 11.

**2. The mischaracterization of the house is reversible error.**

This Court will reverse a trial court’s property mischaracterization, where “(1) the trial court’s reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way.” **Shui**, 132 Wn. App. at 586. Here, the trial court’s mischaracterization of Todd’s former house as community property plainly “significantly influenced” the equitable judgment awarding Sherry \$205,000 – 50% of the house’s value. CP 129.<sup>7</sup> The

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<sup>7</sup> The mischaracterization also “significantly influenced” the court’s ruling that Todd breached a fiduciary duty when he deeded the house to the Parkers. *Infra*, Argument § B. 1.

equitable judgment is expressly based on calculating the “community portion” of the house (*id.*):

[Todd’s] failure to account and document the 2005 appreciated value of the property compared to the note plus interest is a breach of fiduciary duty. The court had considered initially the difference between the value at the time of marriage and the value at the time of separation or quitclaim as the community portion of this property. However the more fair and equitable conclusion to be drawn from the facts evidenced at trial is that the property, land and house, should be construed as a gift to the community . . . The court establishes the value of this community asset as \$411,000 based on the 2005 tax assessed value . . . The value of this asset is awarded half to each party. An equitable judgment in favor of Sherry Parker is awarded in the amount of \$205,000 at 12% interest.

And the record does not indicate that the trial court would have awarded Sherry half the house’s value regardless of the characterization. ***Shui***, 132 Wn. App. at 587 (reversing where, “the record does not clearly indicate that the trial court would have distributed the property in the same way regardless of the characterization . . .”). Reversal is appropriate because the trial court did “not specifically state that it would have made the same decision regardless of the characterization.” *Compare* CP 128-29 *with Shui*, 132 Wn. App. at 587.

3. **The trial court improperly found that Todd breached his fiduciary duty to the community by transferring his separate property to pay a separate debt.**

Mischaracterizing Todd's former house also significantly influenced to the court's conclusion that Todd breached a fiduciary duty, where he deeded the house to the Parkers without accounting for the house's appreciated value as compared to its attached debt. CP 128-29. Spouses have a fiduciary duty "to act in good faith when managing community property." **Chumbley**, 150 Wn.2d at 9. Each spouse has the "the statutory duty to manage and control community assets for the benefit of the community." 150 Wn.2d at 9 (quoting **Peters v. Skalman**, 27 Wn. App. 247, 251, 617 P.2d 448 (1980), citing Harry M. Cross, *The Community Property Law in Washington*, 49 Wash. L.Rev. 729 (1974)); RCW 26.16.030. "[G]ood faith rather than good judgment is the rule." **Chumbley**, 150 Wn.2d at 9 (citing Cross, 61 Wash. L.Rev. at 82-83).

Todd was not "managing community property" – he was managing his separate property. **Chumbley**, 150 Wn. 2d at 9. And there is no statutory duty to control separate assets "for the benefit of the community. 150 Wn. 2d at 9. While there may be circumstances in which conveying separate property could be a breach of fiduciary duty to the community, it seems that fiduciary

duties and statutory duties typically govern the management of community assets. *Id.* As such, there is no indication that the court would have found a breach of fiduciary duty if it had correctly characterized the house as Todd's separate property. ***Shui***, 132 Wn. App. at 587.

In any event, failing to fully account for appreciation was at most a lack of "good judgment," not a lack of "good faith." ***Chumbley***, 150 Wn.2d at 9. The conveyance extinguished Todd's \$244,017 debt to the Parkers – an obvious benefit. RP 70, 99-102, 264-65, 271-72; CP 98; Ex 38. Although (unbeknownst to Todd), the house was worth \$166,982 more than the debt, the community benefited significantly from the conveyance, which allowed them to move into the Parkers' bigger, nicer house, living there for six years often without paying rent. RP 100-02, 169-70, 264-65, 318; CP 91, 98. This was "in the community interest." ***Chumbley***, 150 Wn.2d at 9.

**4. The equitable judgment is grossly excessive.**

Even assuming *arguendo* that the trial court could award Sherry an equitable judgment, the amount is far too high in light of the court's own rationale. The court's equitable judgment is based on its belief that deeding the house to the Parkers damaged the

community to the tune of \$166,982.88 (\$411,000 house value - \$244,017.12 note and interest). RP 99-102, 264-65, 271-72; CP 91, 98; Ex 38. Under the court's theory that the house was a community asset that should have been divided in the dissolution, Sherry's 50% share would be \$83,491.44 – over \$121,000 less than the court awarded her. CP 129. This number would have to be reduced by the community benefit from living for six years in the Parkers' bigger, nicer home, at little or no rent. RP 100-02, 264-65.

The trial court also erroneously refused to offset the equitable judgment with Todd's \$244,017.12 debt to the Parkers, explaining that if the quitclaim had not paid off the debt, then the court would have "assigned [it] to Todd as his separate debt." CP 129. This rationale is untenable – the court cannot characterize the house as community property, yet characterize the debt as separate debt.

At the very least, the court would have to use the house's 2011 value, \$43,000 less the 2005 value the court divided 50/50. CP 100-15, 129. There simply is no basis for using the outdated 2005 value, where the court had uncontested evidence of the house's value closer to the dissolution.

In sum, this Court should reverse, where the trial court's mischaracterization is plainly the basis of the equitable judgment and of the ruling that Todd breached a fiduciary duty.

**C. The trial court failed to consider the controlling statute, erroneously awarding lifetime maintenance, based on the untenable conclusion that disposing of debt-ridden, valueless assets somehow damaged the community.**

The trial court's lifetime-maintenance award is based on its untenable conclusion that Todd breached a fiduciary duty to the community, where he and Sherry deeded valueless property to the Parkers, wiping out nearly \$500,000 in community debt. The court neglected to consider how Todd will pay maintenance, where he has no savings or other assets from which to pay. The court also neglected to consider that Sherry is voluntarily underemployed even though she has significant job training and experience, and is physically capable of working more. The maintenance award unjustly requires Todd to work fulltime – for the rest of his life – to support an ex-wife who chooses to work part-time.

**1. Maintenance is not supposed to be a permanent lien on an ex-spouse's income.**

Lifetime maintenance is generally disfavored. *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 509 (1974). Maintenance is not a matter of right and is not intended to be a "perpetual lien on

the other spouse's future income." *In re Marriage of Sheffer*, 60 Wn. App. 51, 54, 802 P.2d 817 (1990) (citing *Hogberg v. Hogberg*, 64 Wn.2d 617, 619, 393 P.2d 291 (1964)). Rather, it is intended to support a spouse until he or she is able to become self-supporting. *In re Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (1992). This Court will reverse a maintenance award based on untenable reasons. *Cleaver*, 10 Wn. App. at 16.

**2. The trial court correctly determined that the investment properties were valueless.**

The trial court's lifetime-maintenance award is based on its incorrect conclusion that Todd breached a fiduciary duty to the community, where the parties deeded community investment properties to the Parkers. CP 127-28, 201-02. The undisputed evidence, however, is that these properties had lost all of their value and that deeding them to the Parkers benefited the community, wiping out nearly \$500,000 in debt. RP 110-12, 271.

The Parkers gifted the community a number of investment properties, with the intention that Todd and Sherry would share in the profits after paying their share of the development costs. RP 106-07, 237-39, 261. Luther Parker testified that due to the depressed economy and the water moratorium Kittitas County

enacted, these properties were “in the tank” – *i.e.*, worthless. RP 261. His testimony was uncontroverted. CP 128.

There was no evidence that the investment properties would have become profitable at any foreseeable time in the future. RP 274-75, 281. Luther listed several properties, but sold only one at a loss. RP 262, RP 274-75. No one even looked at the others. RP 262.

Luther anticipated that he would not see a penny for at least three years. RP 274-75. He was not talking about making a profit, or even breaking even – but just about recouping some of his losses. *Id.* He did not think that he would live long enough to break even. RP 281. No one attempted to speculate about when – if ever – the properties would become profitable.

The trial court concluded that Luther provided “credible” evidence that the “investment properties are in fact ‘under water.’” CP 128. There was no contrary evidence. Based on Luther’s testimony and other evidence, the court concluded that it would not be able to assign a “net community value” to the properties if they were before the court for distribution (*id.*):

In addition to Luther Parker’s testimony the court is persuaded by the evidence regarding the depressed economy and the water moratorium that there is no reliable

evidence before the court to identify a net community value to the investment properties even if there were still a community share in the properties.

In short, Luther's testimony was uncontroverted. There simply was no evidence that these properties had any value.

In fact, the properties were less than valueless – they were debt-ridden. RP 271-72; Ex 41. Luther calculated that Todd and Sherry owed the Parkers \$498,000 for their share of the development costs on these properties. *Id.* It was undisputed that deeding the properties to the Parkers extinguished that debt. RP 272.

If the investment properties had still been a community asset before the court for distribution, the court would have been dividing the half-million-dollar debt. RP 270-71; Ex 41. Although Sherry might have been awarded some valueless land that she could not sell, she also would have been awarded the attached debt. *Id.*

**3. The trial court improperly concluded that Todd breached a fiduciary duty to the community when the parties transferred the debt-ridden, valueless properties.**

As discussed above, spouses must manage community property in good faith. *Chumbley*, 150 Wn.2d at 9. The trial court's conclusion that Todd breached a fiduciary duty when the parties transferred the investment properties to the Parkers is at

odds with the uncontroverted evidence – the properties had no value – and the transfer relieved the community of nearly \$500,000 in debt. RP 110-12, 271. In short, it is untenable to correctly find that the properties had no value, but to also (incorrectly) conclude that transferring them showed a lack of good faith. CP 128; **Chumbley**, 150 Wn.2d at 9-10.

Again, it is undisputed that the investment properties were valueless. RP 110-11, 262-65. The trial court ruled that Luther Parker’s testimony on this point was credible and that there was no evidence from which the court could assign a value to the properties. CP 128. It simply makes no sense to rule that transferring valueless assets shows a lack of good faith in the management of community property. *Id.*

Again too, it is undisputed that deeding the investment properties to the Parkers relieved the community of nearly \$500,000 in debt. RP 270-72; Ex 41. This massive debt-relief plainly benefited the community. But the trial court did not even address this community benefit. CP 126-28, 201-02.

It is also undisputed that the parties would not have seen any profit on these properties for many years, if at all. RP 274-75, 281. The parties would not get a penny until the properties became

profitable at some unforeseeable point in the future, and even then, only after they paid the Parkers \$498,000 they did not have.

The only evidence before the court was that Todd's sole motivation was to rid the community of valueless property and to get out from under \$498,000 in debt. RP 111-12, 270-71. Doing so was plainly "in the community interest." *Chumbley*, 150 Wn.2d at 9, (quoting *Schweitzer v. Schweitzer*, 81 Wn. App. 589, 597, 915 P.2d 575 (1996)). There was no breach of fiduciary duty.

**4. The court also failed to consider the relevant statutory factors.**

The trial court also failed to consider the statutory factors, summarily concluding that they sustained the maintenance award. CP 127, 202. Maintenance must be "just" in light of all relevant factors, including those enumerated in RCW 26.09.090(1):

(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.

The trial court must “consider” these factors. *In re Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004); *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

The most the trial court said about factors (a), (b), or (e) was that Sherry’s income was “unlikely to vary substantially.” CP 126, 201. The court cited Sherry’s “medical history,” but Sherry has no medical restrictions and can “resume [her] life.” *Compare* CP 126, 201 *with* RP 371-72. Sherry has “no pain” and no longer takes pain medication for her neck. *Compare* CP 126, 201 *with* RP 26, 309. She regularly mows the lawn, using lawnmowers too dangerous for her 14-year-old son. RP 369, 372. She is “constantly cleaning” the 3,000-square-foot house she lives in with G.P. RP 369. And Sherry never blamed her failure to work full-time on her medical

history, explaining that she wanted “to be available for my kids.”  
RP 369.<sup>8</sup>

The trial court also never considered that Sherry had training to find self-sufficient employment, or what additional training she might need. RCW 26.09.090(1)(b). Sherry completed dental-assistant courses, but chose not to use those skills. RP 319, 373. She has taken a computer class, and has a significant work history. RP 153-54, 292, 309-11, 331, 335-37. And there is no indication that Sherry could not work full-time at her current job. RP 325-26.

The court did not address factor (c) the parties’ standard of living during the marriage. CP 126-28, 201-02. As to factor (d), the court stated that the 17-year marriage warranted equalizing the parties’ incomes indefinitely. CP 126, 201-02. A 17-year marriage is not a long-term marriage. *Rockwell*, 157 Wn. App. at 452 (“In dissolving a marriage of 25 years or more, the trial court must put the parties in roughly equal financial positions for the rest of their lives”).

The trial court also erroneously failed to address factor (f) – how Todd will pay maintenance and support himself. RCW

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<sup>8</sup> When calculating child support, the courts must impute income to a spouse who is “voluntarily underemployed” to care for children. *In re Marriage of Goodell*, 130 Wn. App. 381, 389-90, 122 P.3d 929 (2005).

26.09.090(1)(f); CP 126-28, 201-02. Todd has no assets from which to pay maintenance. RP 136-37, 146; CP 208.

Before the divorce, Todd had about \$1,630 in cash savings. CP 72. He has several separate debts. CP 201. Todd had \$4,919.97 in his pension account when the parties separated, half of which the court awarded to Sherry. RP 90, 137, 228-29; Ex 28; CP 208. The remainder is slightly more than one-month's maintenance payment. There is no indication that Todd's pension will be enough to support him, much less to continue supporting Sherry 14 years from now, when Todd turns 65 years-old. The court committed "clear error" in overlooking this issue. *Mathews*, 70 Wn. App. at 124-25 (holding that the trial court committed "clear error," where its lifetime-maintenance award "overlooked" that the husband would have to use his retirement or disability funds to pay the award, even though the wife was distributed one-half of those funds).

And there is also no knowing how much longer Todd will be able to work fulltime. Working as a carpenter is physically demanding, making it challenging to work as the person ages. RP 122. And the trial court believed that the Parkers are not financially supporting Todd. RP 408.

Considering, as the Court must, the parties' post-dissolution financial circumstances, this case is unlike any case addressing a lifetime – or even long-term – maintenance award. Although lifetime maintenance is disfavored, “[o]ur courts have approved awards of lifetime maintenance in a reasonable amount when it is clear the party seeking maintenance will not be able to contribute significantly to his or her own livelihood.” **Mathews**, 70 Wn. App. at 124. In such cases, the party seeking maintenance is typically seriously ill or otherwise disabled, and the spouse paying maintenance typically received a large and disproportionate share of assets, from which he can make maintenance payments:

- ◆ In **Hadley**, the Supreme Court affirmed an award to the wife of \$545,000 in community property, and \$480,000 in maintenance over a 10-year term. **Hadley**, 88 Wn.2d at 651. The wife was “totally disabled.” 88 Wn.2d at 651. Her total award – property and maintenance – was only 11% of the parties’ total assets. *Id.* at 652-53, 659, 674 (*dissent*).
- ◆ In **Tower**, this Court affirmed a permanent maintenance award, where the wife had multiple sclerosis that substantially limited her activities. **In re Marriage of Tower**, 55 Wn. App. 697, 698-99, 780 P.2d 863 (1989). The husband received 63% of the property, all of which was community. **Tower**, 55 Wn. App. at 698-99.

These cases are inapposite. Sherry is not ill or disabled.

RP 26, 371-72. Todd did not receive a large, disproportionate

asset distribution from which to pay maintenance – the court split evenly the little property the parties had. CP 208.

The trial court incorrectly compared this case to ***Marriage of Morrow***, 53 Wn. App. 579, 770 P.2d 197 (1989), which is also inapposite. CP 127, 202. There, the trial court awarded the husband assets valued at \$720,000-to-\$800,000, finding that he possessed nearly \$500,000 more in “resources identifiable to the parties.” ***Morrow***, 53 Wn. App. 582-83. The court awarded the wife \$117,000, and ordered the husband to pay her \$58,000 mortgage. 53 Wn. App. at 582. The trial court awarded the wife \$2,200 lifetime maintenance, finding that (1) the husband had converted community property to his separate use; (2) the husband likely dissipated and concealed assets; and (3) the wife could not work full-time due to a vision problem that periodically rendered her legally blind. *Id.* at 581, 588. This Court affirmed. *Id.* at 587-89.

This matter is nothing like ***Morrow***. This Court noted that the husband in ***Morrow*** could pay maintenance from interest on less than half of his assets. *Id.* at 587. Todd does not have any assets from which to pay maintenance. And Todd did not convert the investment properties to his own use – when the properties lost all of their value, due to circumstances completely outside of Todd’s

control, the parties deeded them to the Parkers to get out from under a \$498,000 debt. CP 128; RP 271-72. This benefited the community. And nothing prevents Sherry from working full-time. RP 26, 371-72. The trial court's reliance on **Morrow** is misplaced.

In sum, Todd did not breach a fiduciary duty to the community – transferring the debt-ridden, valueless assets benefited the community. Neither this transfer, nor the statutory factors support the lifetime maintenance award.

**D. The trial court incorrectly ordered that G.P. would decide whether to visit Todd, despite the parenting evaluator's recommendations to the contrary.**

This Court reviews for an abuse of discretion the trial court's rulings regarding residential placement. **Shui**, 132 Wn. App. at 590. Residential placement must be in the child's best interest, based on the factors enumerated in RCW 26.09.187(3)(a). 132 Wn. App. at 590.

Parenting evaluator Kathleen Kennelly opined, consistent with sixteen-year-old K.P.'s wishes, that K.P. should live with Todd and be allowed to decide whether to visit Sherry. RP 21-22. Kennelly adopted K.P.'s preference, given her age and her acrimonious relationship with Sherry, including K.P.'s belief that Sherry drinks to excess. *Id.*

Although fourteen-year-old G.P. wanted to live with Sherry, he never expressed a desire to have visitation with Todd left to his discretion. RP 21-22, 57-58. Kennelly recommended that G.P. live with Sherry, but specifically opined that visitation with Todd should be mandatory, where G.P. (1) had a history of “contradicting himself” to his counselor; and (2) was too young to make such a difficult decision. RP 22, 51.<sup>9</sup>

Although the court otherwise adopted Kennelly’s recommendations, it rejected her recommendation that G.P. should have mandatory visitation with Todd. CP 126, 228 ¶ 3.2. The court recognized that G.P. should have less discretion than K.P. based on his younger age, but explained that “the fairness issue in the context of the alienation” mandated that G.P.’s visitation would also be optional. CP 126.

On its face, this decision has nothing to do with G.P.’s best interest. *Id.*; **Shui**, 132 Wn. App. at 590. The only evidence before the court suggests that it is not in G.P.’s best interest to require him to choose whether to have visitation with Todd. RP 22, 51. The

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<sup>9</sup> Kennelly was concerned about G.P. “contradicting” himself, where he told his counselor that Sherry had a drinking problem when Todd was in the session with G.P., but agreed with Sherry that she did not have a drinking problem when Sherry was in the session with G.P. RP 20-21.

court's only consideration seems to have been "fairness" to Sherry.

CP 126. This Court should reverse.

**E. The trial court must reconsider its fee award in light of the reversal on other issues.**

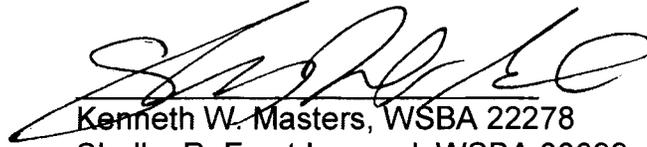
The fee award is based in part on the trial court's findings that Todd breached a fiduciary duty to the community. CP 129-30. If this Court reverses on one or both of the fiduciary-duty issues, it should also reverse the fee award.

**CONCLUSION**

Mischaracterizing Todd's former house as community property plainly lead the trial court to erroneously award Sherry a \$205,000 equitable judgment. The court erred again in awarding Sherry lifetime maintenance based on the untenable decision that conveying debt-ridden, valueless assets somehow harmed the community. And the court erroneously required 14-year-old G.P. to decide whether to visit Todd, contrary to the parenting evaluator's recommendations. This Court should reverse.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of November,  
2011.

MASTERS LAW GROUP, P.L.L.C.

A handwritten signature in black ink, appearing to read "Kenneth W. Masters", written over a horizontal line.

Kenneth W. Masters, WSBA 22278  
Shelby R. Frost Lemmel, WSBA 33099  
241 Madison Avenue North  
Bainbridge Is, WA 98110  
(206) 780-5033

**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 1<sup>st</sup> day of November 2011, to the following counsel of record at the following addresses:

Co-counsel for Appellant

Donna J. Campbell  
P.O. Box 1163  
North Bend, WA 98045-1163

Counsel for Respondent

Gordon Lotzkar  
10900 NE 8<sup>th</sup> Street, Suite 820  
Bellevue, WA 98004



Shelby R. Frost Lemmel, WSBA 33099  
Counsel for Appellant



1 **2.2 Notice to the Respondent**

2 The respondent appeared, responded or joined in the petition.

3 **2.3 Basis of Personal Jurisdiction Over the Respondent**

4 The facts below establish personal jurisdiction over the respondent.

5 The respondent is currently residing in Washington.

6 The parties lived in Washington during their marriage and the petitioner continues  
7 to reside, or be a member of the armed forces stationed, in this state.

8 The parties may have conceived a child while within Washington.

9 **2.4 Date and Place of Marriage**

10 The parties were married on November 27, 1993 at Snoqualmie WA.

11 **2.5 Status of the Parties**

12 Husband and wife separated on December 28, 2009.

13 **2.6 Status of Marriage**

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

16 **2.7 Separation Contract or Prenuptial Agreement**

17 The parties executed a Prenuptial Agreement 3 days before their marriage, which  
18 Prenuptial the husband seeks to enforce. The Court invalidates the Prenuptial Agreement  
19 dated November 24, 1993 because the circumstances surrounding the signing of the  
20 agreement did not afford the wife, Sherry Parker sufficient opportunity to intelligently  
and voluntarily sign it.

21 **2.8 Community Property**

22 The parties have real or personal community property as set forth in the Decree of  
23 Dissolution. This is attached or filed and incorporated by reference as part of these  
24 findings. The Court is aware that the husband filed for Federal bankruptcy relief. To the  
25 extent that this Court is able to, this Court establishes the nature of and the distribution of  
all property before this Court and sets forth its Findings below.

1 All property, both community and separate is before this Court for an equitable  
2 distribution.

3 **2.9 Separate Property**

4 The parties have real or personal separate property as set forth in the Decree of  
5 Dissolution. This is attached or filed and incorporated by reference as part of these  
6 findings.

7 **2.10 Community Liabilities**

8 There are no known community liabilities.

9 **2.11 Separate Liabilities**

10 The wife has no known separate liabilities.

11 The husband testified regarding a \$70,000 note plus interest to complete the construction of a house.  
12 The note was not secured by the property. The house was quitclaimed to the husband's parents and,  
13 to the extent that the quitclaim did not pay the note, the husband shall be responsible for the  
14 \$70,000 promissory note plus interest to his parents for the loan to complete the house  
15 which was not secured by the property.

16 The husband has incurred the additional following separate liabilities:

17 Bank of America Credit Card owing approximately \$12,000.00

18 MRI bill owing approximately \$1500.00

19 Debt to Parents, Luther and Marlene Parker, amount unknown

20 Any debt left owing from Promissory Note given to Luther and Marlene Parker of  
21 \$70,000.00 plus interest that was lent to complete the home, which was paid off when  
22 home was quit claimed to Luther and Marlene Parker in June 2005 (the husband is  
23 currently in a chapter 7 bankruptcy, in which he is seeking to discharge his separate  
24 debts)

25 **2.12 Maintenance**

Maintenance shall be paid as set forth in the Decree of Dissolution and Memorandum  
Findings and Order on Dissolution trial.

For purposes of maintenance and child support the court finds that the father's gross  
monthly income to be \$5,880.00 and the mother's to be \$1,175.00 The earning history of  
the parties, the testimony of Janice Reha, and the wife's medical history establish that  
these amounts are unlikely to vary substantially in their working lifetime. The seventeen  
year term of the marriage requires that the parties be placed on an equal economic

1 footing. In addition, the husband had been the sole and exclusive financial manager for  
2 the community but breached his fiduciary duties to the community and, in fact, took  
3 action to purposefully transact affairs for the community that was in his personal future  
4 interest to the detriment of the community. As such, there is limited property that is  
5 available to this Court to attempt to distribute and thus this Court believes that the wife  
6 should be entitled to lifetime spousal support.

7 The Court orders a maintenance payment of \$2000.00 per month for the wife's lifetime.  
8 The statutory factors in RCW 26.09.090 alone all support the maintenance award. In  
9 considering the term of the award the court is mindful of the similarities in this case to  
10 the facts in In re Marriage of Morrow, 53 Wash. App. 579(1989). Mr. Parker has been the  
11 sole and exclusive financial manager for the community and has breached his fiduciary  
12 duties in quitclaiming away the substantial real properties indentified at trial without  
13 reasonable, prudent or good faith regard for the community interest. While  
14 anticipating a secure future for himself based on his parents wealth Mr. Parker has done  
15 absolutely nothing to secure the future of his wife and children. In fact he has taken  
16 affirmative steps to jeopardize that future. It should be noted that court is not finding  
17 fraud in the quitclaim transactions but breach of fiduciary duty in conduct of the  
18 community's financial affairs. In addition, the husband, as additional spousal support  
19 shall pay off the loan on the purchase of the wife's car.

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

22 **2.13 Continuing Restraining Order**

23 Does not apply.

24 **2.14 Protection Order**

25 Does not apply.

**2.15 Fees and Costs**

The wife has the need for the payment of fees and costs and the other spouse has the  
ability to pay these fees and costs. The wife has incurred reasonable attorney fees and  
costs in the amount of \$38,010.32.

The Petitioner/husband has been intransigent. He has sought to avoid responsibility for  
his family. He has failed to comply with court orders. He has made the trial more difficult  
by failing to provide evidence of transactions and property values. He has attempted to  
delay the trial with a bankruptcy the apparently has nothing to do with trial issues.  
Therefore based on intransigence and his comparative greater earning ability (double at  
the very least) he is ordered to pay the Respondent's attorney fees in the amount of

\$38,010.32 and judgment should be entered to that extent.

**2.16 Pregnancy**

The wife is not pregnant.

**2.17 Dependent Children**

The children listed below are dependent upon either or both spouses.

<u>Name of Child</u>	<u>Age</u>	<u>Mother's Name</u>	<u>Father's Name</u>
Kenzie	16	Sherry Parker	Todd Parker
Grayson	14	Sherry Parker	Todd Parker

**2.18 Jurisdiction Over the Children**

This court has jurisdiction over the children for the reasons set forth below.

This state is the home state of the children because:

The children lived in Washington with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

Any absences from Washington have been only temporary.

The children and the parents or the children and at least one parent or person acting as a parent, have significant connection with the state other than mere physical presence; and substantial evidence is available in this state concerning the children's care, protection, training and personal relationships; and

The children have no home state elsewhere.

**2.19 Parenting Plan**

The parenting plan signed by the court on this date is approved and incorporated as part of these findings.

1 **2.20 Child Support**

2 There are children in need of support and child support should be set pursuant to the  
3 Washington State Child Support Schedule. The Order of Child Support signed by the court  
4 on this date and the child support worksheet, which has been approved by the court, are  
5 incorporated by reference in these findings.

6 **2.21 Other**

7 The Court finds that Todd Parker is not a credible witness because of his failure to  
8 provide records, documents, appraisals or other hard factual financed date regarding the  
9 residential and investment properties.

10 The Court finds that the Petitioner's failure to account and document the 2005  
11 appreciated value of the property compared to the note plus interest is a breach of  
12 fiduciary duty.

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, make provision for a  
23 parenting plan for any minor children of the marriage, make provision for the support of  
24 any minor child of the marriage entitled to support, consider or approve provision for  
25 maintenance of either spouse, make provision for the disposition of property and  
liabilities of the parties, make provision for the allocation of the children as federal tax  
exemptions, make provision for any necessary continuing restraining orders, and make

provision for the change of name of any party. The distribution of property and liabilities as set forth in the decree is fair and equitable.

**3.5 Continuing Restraining Order**

Does not apply.

**3.6 Protection Order**

Does not apply.

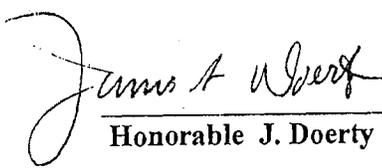
**3.7 Attorney Fees and Costs**

Attorney fees, other professional fees and costs should be paid by the Petitioner in the amount of \$38,210.86

**3.8 Other**

Does not apply.

Dated: April 8 2011

  
\_\_\_\_\_  
Honorable J. Doerty

Presented by:

Approved for entry:  
Notice of presentation waived:

  
\_\_\_\_\_  
Gordon Lotzkar, WSBA#25701  
Attorney for Respondent

  
\_\_\_\_\_  
Donna J. Campbell, WSBA# 30458  
Attorney for Petitioner



1           One of the more inconsistent and self serving aspects of Todd Parker's testimony is while  
2 insisting on the validity of the prenuptial agreement which clearly identifies the \$70,000 loan  
3 from his parents to finish the house *as his separate debt* he persistently testified that "we" owed  
4 them that money and the interest.

5           PARENTING PLAN

6           The court accepts the recommendation of the parenting evaluator Kathleen Kennelly,  
7 M.S.W. as set forth in Ex. 23. Except that the recommendation that if Kenzie does not want to  
8 spend the weekend with her mother, she should not have to is applied *vice versa* to Grayson.  
9 Although the age difference between the children suggests that Grayson should perhaps have less  
10 discretion or choice in the amount of time he spends with his father the fairness issue in the  
11 context of the alienation concerns is more significant. The parenting evaluator recommendations  
12 shall be converted into a mirror image parenting plan with Kenzie living with her father and  
13 Grayson with his mother. Section VI of the recommendations is adopted as proposed. The court  
14 will not require a substance abuse evaluation for the mother. Although there may be issues with  
15 alcohol or substance abuse given the lack of credibility found in the Petitioner and the "pile on"  
16 noted by the parenting evaluator the court is compelled to discount the Petitioner's "concerns"  
17 and historically version of the Respondent's behavior.

18           SPOUSAL MAINTENANCE

19           For purposes of maintenance and child support the court finds that the father's gross  
20 monthly income to be \$5,880.00 and the mother's to be \$1,175.00. The earning history of the  
21 parties, the testimony of Janice Reha, and the wife's medical history establish that these amounts  
22 are unlikely to vary substantially in their working lifetime. The seventeen year term of the  
23 marriage requires that the parties be placed on an equal economic footing. Therefore the  
24 difference between monthly gross earnings of \$4,625 should be equally divided so that each  
25 party has approximately the same income. This figure is \$2,312.00. The husband is paying \$250  
26 per month for the wife's automobile and is ordered to continue doing so until the vehicle is paid

1 off and title transferred to the wife. The court orders a maintenance payment of \$2000 for the  
2 wife's lifetime. Mr. Parker is ordered to obtain term life insurance as security for his  
3 maintenance obligation.

4 The statutory factors in RCW 26.09.090 alone all support the maintenance award. In  
5 considering the term of the award the court is also mindful of the similarities in this case to the  
6 facts in In re Marriage of Morrow, 53 Wash. App. 579 (1989). Mr. Parker has been the sole and  
7 exclusive financial manager for the community and has breached his fiduciary duties in  
8 quitclaiming away the substantial real properties identified at trial without reasonable, prudent or  
9 good faith regard for the community interest. While anticipating a secure future for himself  
10 based on his parents wealth Mr. Parker has done absolutely nothing to secure the future of his  
11 wife and children. In fact he has taken affirmative steps to jeopardize that future. It should be  
12 noted that the court is not finding fraud in the quitclaim transactions but breach of fiduciary duty  
13 in conduct of the community's financial affairs.

14 Mr. Parker's own testimony establishes that the community shares in the various Kittitas  
15 County properties were gifted to *the community* by his parents for the benefit of the community.  
16 Mr. Parker's explanation for the return of the properties to his parents is not substantiated by any  
17 hard financial facts, in particular appraisals, development expenses and or even an approximate  
18 value of his "sweat equity". The timing of the quitclaims is highly suspect given his testimony  
19 about the beginning of the end of the marriage. Mr. Parker's testimony that he and Mrs. Parker  
20 discussed the investment and decided together to quitclaim is completely unbelievable. This is  
21 the reason the credibility finding above makes a difference. Mr. Parker, contrary to his  
22 testimony, decided the business matters, he told her what to sign, and she did as he told her.  
23 There was no mutual decision or understanding. Mr. Parker's may or may not have been  
24 motivated to avoid valuation and/or distribution of these properties in divorce. The testimony of  
25 Mr. Luther Parker, his father, supports that he was even if the other circumstances surrounding  
26 the quitclaims are susceptible to alternative interpretation.

1 Notwithstanding the breach of fiduciary responsibility to the community there is credible  
2 evidence by Luther Parker that the Kittitas County investment properties are in fact “under  
3 water” which it to say Todd Parker’s self-serving decision to quit claim the community interest  
4 to avoid the possibility of taxes based on the assessments under appeal, or any outstanding  
5 development or maintenance expenses, may not have been entirely unreasonable in theory. This  
6 is particularly so given Luther Parker’s advanced age. In addition to Luther Parker’s testimony  
7 the court is persuaded by the evidence regarding the depressed economy and the water  
8 moratorium that there is no reliable evidence before the court to identify a net community value  
9 to the investment properties even if there were still a community share in the properties. The  
10 absence of documentation for the quitclaim decision, the failure to educate, inform or otherwise  
11 account for the decision at the time made, and the failure of the Petitioner to establish a basis to  
12 determine value at trial cause the court to extend what might otherwise have been a shorter term  
13 of maintenance to the lifetime of the Respondent. In other words the assets are insufficient to  
14 contribute to the support of the wife so the husband is going to pay permanent maintenance.

15 OTHER PROPERTY ISSUES

16 The court invalidates the Prenuptial Agreement of November 24, 1993 because the  
17 circumstances surrounding the signing of the agreement did not afford Sherry Parker sufficient  
18 opportunity to intelligently and voluntarily sign it. Marriage of Matson, 107 Wash. 2d 479  
19 (1986).

20 The residential property at 4745 365<sup>th</sup> SE, Fall City was also quitclaimed at Todd  
21 Parker’s direction without regard to his fiduciary responsibility to the community. The timing  
22 and other circumstances of this 2005 transaction is less suspect than the transactions regarding  
23 the Kittitas properties although this fact is counter balanced by the very suspicious timing of the  
24 recording, 13 days before the original trial date. Mr. Parker made no accounting at the time of  
25 quitclaim or at the trial for the transaction, merely testifying that “we owed them (his parents) a  
26 lot and decided to give them back the property”. This testimony raises doubts about Todd

1 Parker's own sense of the validity of the prenuptial agreement since according to the agreement  
2 the construction note and the land and house are all his separate property. His failure to account  
3 and document the 2005 appreciated value of the property compared to the note plus interest is a  
4 breach of fiduciary duty. The court had considered initially the difference between the value at  
5 the time of marriage and the value at the time of separation or quitclaim as the community  
6 portion of this property. However the more fair and equitable conclusion to be drawn from the  
7 facts evidenced at trial is that the property, land and house, should be construed as a gift to the  
8 community, the prenuptial agreement notwithstanding because the prenuptial agreement is  
9 invalid and unenforceable. The court establishes the value of this community asset as \$411,000  
10 based on the 2005 tax assessed value provided by the Petitioner in his March 3<sup>rd</sup> post trial  
11 submission. The value of this asset is awarded one half to each party. An equitable judgment in  
12 favor of Sherry Parker is awarded in the amount of \$205,000 at 12% interest.

13 The \$70,000 note plus interest for the loan to complete the house was not secured by the  
14 property and should, were it not paid by the quitclaim, be assigned to Todd Parker as his separate  
15 debt. Those sums should not be an off-set to the equitable judgment.

16 The ending balance in the CIAPP, of \$4,919.97 (EX 28) and any other cash assets should  
17 be divided equally between the parties. Each party should keep the vehicles currently in his or  
18 her possession.

#### 19 CHILD SUPPORT

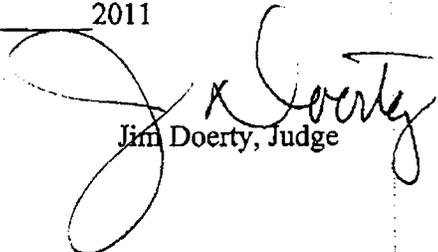
20 Since the maintenance order equalizes income for the parents and each is the custodial  
21 parent for a child on the same age table the court anticipates that there will be a zero transfer  
22 payment. Counsel is directed to submit proposed work sheets and orders accordingly. The father  
23 is required to maintain health insurance for both children.

#### 24 ATTORNEY FEES

25 The Petitioner has been intransigent. He has sought to avoid responsibility for his family.  
26 He has failed to comply with court orders. He has made the trial more difficult by failing to

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

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Done this 9 of March 2011  
  
Jim Doerty, Judge

## **RCW 26.09.090**

# **Maintenance orders for either spouse or either domestic partner — Factors.**

(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.

[2008 c 6 § 1012; 1989 c 375 § 6; 1973 1st ex.s. c 157 § 9.]

## **RCW 26.16.010**

# **Separate property of spouse.**

Property and pecuniary rights owned by a spouse before marriage and that acquired by him or her afterwards by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his or her spouse, and he or she may manage, lease, sell, convey, encumber or devise by will such property without his or her spouse joining in such management, alienation or encumbrance, as fully, and to the same extent or in the same manner as though he or she were unmarried.

[2008 c 6 § 602; Code 1881 § 2408; RRS § 6890. Prior: See Reviser's note below.]

## **RCW 26.16.030**

# **Community property defined — Management and control.**

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property. Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property, except:

- (1) Neither person shall devise or bequeath by will more than one-half of the community property.
- (2) Neither person shall give community property without the express or implied consent of the other.
- (3) Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners.
- (4) Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.
- (5) Neither person shall create a security interest other than a purchase money security interest as defined in \*RCW62A.9-107 in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse or other domestic partner joins in executing the security agreement or bill of sale, if any.
- (6) Neither person shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses or both domestic partners participate in its management without the consent of the other: PROVIDED, That where only one spouse or one domestic partner participates in such management the participating spouse or participating domestic partner may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse or nonparticipating domestic partner.

[2008 c 6 § 604; 1981 c 304 § 1; 1972 ex.s. c 108 § 3; Code 1881 § 2409; RRS § 6892.]