

NO. 35570-1-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY                      DEPUTY

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NEIL RADFORD MASON, *Respondent/Appellant*

vs.

ROBIN RUTH MASON, *Petitioner/Respondent*

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**RESPONDENT'S BRIEF**

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**B.** – Did the trial court error in not making a Finding of Fact as to the reasonable value of personal property allocated by it between the parties?

**C.** – Did the trial court abuse its discretion in its division of property?

**D.** – Was there sufficient evidence to support the trial court’s finding that the husband “has the ability to earn up to \$90,000.00 per year” at the time of trial?

**E.** – Did the trial court error in basing its unequal allocation of community assets on a finding that the husband “used community property to pay most of his post separation obligation” when it valued the accounts as of the date of separation so that any use of funds from an account after separation did not impact the allocation

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**No. 3** – Did the trial court error in its decision to not value personal property (Assignment of Error B)?

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## I. Introduction

Respondent has used the same assignments of error as appellant; however, respondent has restated the issues pertaining to the assignments of error.

## II. Assignments of Error

### *Assignments of Error*

**A.** - Did the trial court error in making Finding of Fact 2.8 which found that the value of the Deutsch Bank account was \$30,808.03 at the date of separation in April of 2005?

**B.** – Did the trial court error in not making a Finding of Fact as to the reasonable value of personal property allocated by it between the parties?

**C.** – Did the trial court abuse its discretion in its division of property?

**D.** – Was there sufficient evidence to support the trial court's finding that the husband "has the ability to earn up to \$90,000.00 per year" at the time of trial?

**E.** – Did the trial court error in basing its unequal allocation of community assets on a finding that the husband "used community property to pay most of his post separation obligation" when it

valued the accounts as of the date of separation so that any use of funds from an account after separation did not impact the allocation because the accounts from which he used funds were allocated to him at their value at the date of separation and not at the date of trial?

*Issues Pertaining to Assignments of Error*

**No. 1** – Did the trial court abuse its discretion in the division of assets and liabilities (Assignments of Error A, B, C, D & E)?

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**No. 7** – Did the trial court error in the distribution of assets and liabilities by considering the husband’s failure to work during the marriage (Assignments of Error C, & D)?

**No. 8** – Did the trial court error in the distribution of assets and liabilities by finding that the husband had the ability to earn up to \$90,000.00 per year (Assignments of Error C, & D)?

### III. Statement of the Case

Facts support the trial court’s finding that the husband could earn up to \$90,000.00 a year. The husband testified that he earned \$90,000.00 a year when he worked in October of 2002 (RP 14, lines 16-20). The husband testified that he earned \$48,000.00 per year in a previous job (RP 227, line 12).

Facts support the trial court’s finding with respect to the division of assets and liabilities that the husband’s domestic violence had an impact on the economic circumstances of the parties. The husband testified that he did not work in part due to the issues related to the domestic violence (RP 15, lines 24-25) and

due to the death of his parents and the related farm (RP 15-16, lines 25-1).

Facts support the trial court's findings and ruling with respect to the husband's failure to work and the resulting impact on the economic circumstances of the parties. The husband admitted that he used savings to support the family rather than working (RP 108, lines 21-24).

Facts support the trial court's findings and ruling with respect to the husband's behavior and the resulting impact on the economic circumstances of the parties. The wife testified that the husband was drinking at the time that he last his job (RP 15, lines 24-25).

Facts support the trial courts division of assets and liabilities to the extent that it considered the husband's separate property and the relationship of the separate property to the economic circumstances of the parties. The husband had separate property consisting of his portion of the estate of his parents. The husband received \$40,000.00 for his portion of the estate bank account (RP 237, line 5). The husband testified that the value of the estate real property was about \$750,000.00 (RP 251, lines 18-23).

Facts support the trial court's finding with respect to the value of the Deutsche Bank account. The husband's testimony on the withdrawals from the Deutsche Bank account was evasive. He indicated that he usually took out "chunks of \$15,000.00" (RP 254, lines 23-25). He could not recall whether he took out two separate checks, with one for \$15,000.00 and one for \$15,808.00 (RP 255, lines 12-17). The wife did not know where the husband deposited the check from Deutsche Bank for the withdrawal of \$15,808.00 (RP 261-2, lines 23-11).

The parties met outside of court and agreed on a disposition of most of the personal property (RP 104, lines 9-20). This agreement included values and the personal property was divided relatively equally.

#### IV. Summary of Argument

The wife argues that the trial court did not error. Taken as a whole, the division of the assets and debts was fair and equitable. The trial court considered misconduct only to the extent that the misconduct impacted the economic circumstances of the parties. The testimony related to the Deutsche Bank account was disputed and unclear. Allocating values to the specific items of personal

property was not necessary, as the trial court heard evidence of value and the final division of the personal property was relatively equal. The trial court did not abuse its discretion, and the appellate court should affirm.

#### V. Argument

**No. 1** – Abuse its discretion in the division of assets and liabilities.

The trial court did not abuse its discretion in the division of assets and liabilities. Considering all of the evidence and all of the findings, the trial court fairly and equitably divided the assets and liabilities.

The standard for distribution of property is well established. The rules appear in **Marriage of Muhammad**, 119 Wa.App. 166, 79 P.3d 483 (2003) at page 170-171 as follows:

In a marriage dissolution property division, the trial court distributes property in a manner that is “just and equitable after considering all relevant factors including ... [t]he economic circumstances of each spouse at the time the division of property is to become effective,” **RCW 26.09.080(4)**, which is a “paramount concern.” **In re Marriage of Dessauer**,

97 Wash.2d 831, 839, 650 P.2d 1099 (1982). The division need not be equal nor focus on mathematical preciseness: the goal of fairness is achieved “by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.” **In re Marriage of Tower**, 55 Wash.App. 697, 700, 780 P.2d 863 (1989), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990). Accordingly, a property division will stand on appeal unless there has been a manifest abuse of discretion. **Konzen v. Konzen**, 103 Wash.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985).

The trial court has “broad” discretion in distributing property. **Marriage of Griswold**, 112 Wn. App. 333, 339, 48 P.3d 350 (2002). A trial court abuses its discretion if its decision is “based on untenable grounds.” **Marriage of Harris**, 107 Wn. App. 597, 601, 27 P.3d 656 (2001). The trial court is in the “best position” to assess the facts and to determine what is fair and equitable. **Marriage of Brewer**, 137 Wn. App. 756, 769, 976 P.2d 102 (1999).

In viewing the trial court's decision as a whole, the trial court did not abuse its discretion.

The trial court considered several factors in arriving at the division of assets and liabilities. The factors that the trial court considered are set forth in the Findings of Fact, in Paragraph 2.37, and include the following:

The husband used community property to pay most of his post separation obligations.

The community paid some of the expenses for the estate (of the husband's parents.)

The court has taken into consideration the economic status of the parties at the time of the decree.

The parties have an income disparity.

The husband is voluntarily unemployed but he has the ability to earn up to \$90,000.00 per year.

The husband was not diligent or earnest in his search for employment.

The husband's parents died more than 10 years ago and he has had ample time to grieve and adjust.

The husband has had ample to obtain certifications in the computer field that he needs for employment, whether those certifications are through Microsoft or through some other company.

The husband did not find employment and as a result the parties dissipated community assets, except for the remaining retirement funds.

The husband has had ample time to fulfill his duties as the personal representative of the estate and he has not made an effort to close the estate.

The court has also considered the personal property of the husband in evaluating the economic condition of the parties at the time of the decree.

Both parties have health issues. The husband has dental health issues, but he has not made an effort to use the dental coverage for the past 4 years. The wife has back problems, and may have another back surgery, and she has fibromyalgia. The wife is receiving counseling for domestic violence, and the

wife's crying during the trial evidenced the emotional impact of the domestic violence.

Contrary to the argument put forth by the husband, the trial court did not make its decision on just a few factors.

An equal division of the assets and liabilities is not required.

**Marriage of Davison**, 12 Wn, App. 251, 259, 48 P.3d 350 (2002).

The Trial Court could also consider the separate property of the parties. **Marriage of Griswold**, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). In this case, the husband had a significant inheritance from his parents and he had in effect lived off of the inheritance rather than working.

All in all, the division of the assets and liabilities was reasonable, fair and equitable.

**No. 2** –The Deutsch Bank account.

Similar to the division of property, the trial court has discretion in valuing assets. In **Marriage of Hays**, 80 Wn.App. 202, 204, 907 P.2d (1995), the court stated the rule as follows:

In valuing assets in a dissolution proceeding, the trial court is not generally controlled by fixed

standards. It has wide discretion to consider all relevant facts and circumstances.

After considering all of the circumstances in this case, the trial court found that the value of the Deutsch Bank account was \$30,808.00 at the time of separation. The trial court arrived at this finding after having examined the exhibits and after hearing the testimony of the parties. The testimony of the husband was not clear and evasive. The wife did not know what happened with the money that was withdrawn.

Even if the trial court erred, the error was harmless. **Marriage of Zahn**, 138 Wn. 2d 213, 218, 978 P.2d 498 (1999). The trial court's valuation of the Deutsch Bank account was not a significant factor in the ultimate division of assets and debts.

**No. 3 – Value of the personal property.**

The trial court decided not to value the personal property. Although the trial court elected not to find a value for each item of personal property, it certainly considered the value of the personal property as a whole in arriving at a division of assets and liabilities. The trial court's decision to not value the personal property was most likely a time saving measure.

Although the trial court did not specifically value the personal property, the record does contain evidence of the value of the personal property. The record is sufficient that the appellate court can look at the record and review the fairness of the property division. **Marriage of Hadley**, 88 Wn. 2d. 649, 565 P.2d 790 (1977); **Marriage of Martin**, 22 Wn.App. 295, 297, 588 P.2d 1235 (1969). Based upon a review of the record, it is easy for the appellate court to determine that the personal property division was relatively equal, that the parties submitted lengthy exhibits describing the personal property (Exhibit 62 – see Appendix to Brief of Appellant), and that assigning a value to each item of personal property was time consuming.

If the trial court erred by not assigning a value to each item of personal property, or by not assigning a value to the package of personal property awarded to each spouse, the error was harmless. The ultimate division of the assets and liabilities was fair and equitable, as discussed above.

**No. 4** – Use of community assets to pay post separation obligations.

The husband argues that the trial court based its division of assets and liabilities on the fact that the husband used community property to pay child support and other post separation obligations. The fact that the trial court considered the husbands post separation use of the property as one of many factors, not as the only factor.

**No. 5 –Punishment for domestic violence.**

The husband argues that the disproportionate property division was a result of punishment for the husband's domestic violence. A simple examination of all of the factors that the trial court considered rebuts this argument. The trial court specifically identified several factors in the findings of fact. Even assuming for the sake of argument that punishment was a factor, the husband has not established that punishment was the only factor.

In **Marriage of Muhammad**, 119 Wa.App. 166, 79 P.3d 483 (2003), the appellate court held that the fact that the husband lost his employment as a police officer due to a domestic violence order to prohibited the husband from carrying a weapon was relevant because the loss of employment impacted the economic circumstances of the parties. Although the trial court cannot

consider domestic violence as marital misconduct, it can consider the economic consequences of the behavior.

The trial court can consider conduct that negatively impact the marital community. **Marriage of Steadman**, 62 Wn.App. 523, 528, 821 P.2d 59 (1991). Similarly, the trial court can consider the concealment of assets. **Marriage of Nicholson**, 17 Wn.App. 110, 118, 561 P.2d 1116 (1977). The trial court can consider the drinking of a party when it impacts the economic circumstances of the parties. **Marriage of Clark**, 13 Wn.App. 805, 808, 538 P.2d 145 (1975). The trial court can also consider gambling. **Marriage of Williams**, 84 Wn.App. 263, 270-271, 927 P.2d 679 (1996).

As the trial court considered several factors in its award of property and liabilities, the husband cannot argue that punishment for misconduct was the only factor.

**No. 6 – Punishment for misconduct.**

The same factors that apply to the husband's domestic violence misconduct argument apply to the husband's misconduct. The husband's misconduct was properly considered by the trial court to the extent that it impacted the economic circumstances of the parties.

**No. 7 – Failure to work during the marriage.**

The husband boldly argues that his failure to work did not impact the economic circumstances of the parties. As has been clearly established above, the trial court can consider the husband's conduct to the extent that it impacted the economic circumstances of the parties. The husband did not work for a prolonged period of time. The husband forced the community to use assets to compensate for his lack of income.

**No. 8 – Husband's ability to earn.**

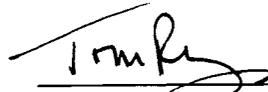
The husband's argument that the trial court improperly found that he had the ability to earn up to \$90,000.00 per year fails because the husband testified that he had earned that amount in the past. Also, the fact that the trial court imputed income for child support purposes at a lower figure is not relevant. Even if the trial court erred, the finding was only one of many factors considered in the trial court's division of the assets and debts.

**VI. Conclusion**

The wife respectfully requests that the Court of Appeals affirm the decision of the trial court.

Dated June 21, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tom Ryan", written over a horizontal line.

G. Thomas Ryan  
Attorney for Respondent  
WSBA # 9634

VII. Appendix

NA

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DIVISION II

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STATE OF WASHINGTON  
BY       
DEPUTY

**COURT OF APPEALS, DIVISION II, STATE OF WASHINGTON**

NEIL RADFORD MASON,	)	
	)	
<i>Respondent/Appellant,</i>	)	NO. 35570-1-II
	)	
vs.	)	
	)	PROOF OF SERVICE
ROBIN RUTH MASON	)	
	)	
<i>Petitioner/Respondent.</i>	)	
_____	)	

G. THOMAS RYAN certifies and declares as follows:

That I am the attorney for Robin Mason, Respondent in the above-entitled action. That on the 9th day of July, 2007, I delivered personally a copy of Respondent's Brief (corrected) in the above-entitled to:

JAMES F. LEGGETT  
PETER KRAM  
Leggett & Kram  
1901 South I Street  
Tacoma, WA 98405

I certify and declare under the penalty of perjury that this certified declaration is true and correct. Signed at Puyallup, WA on July 9th, 2007.

  
G. THOMAS RYAN  
WSBA # 9634