

No. 37372-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

CHRISTOPHER NEIL GUDJOHNSEN,

Respondent,

vs.

LOUISE ANN ABRAMS,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE JAMES E. RULLI

BRIEF OF APPELLANT

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I. INTRODUCTION

After a one-day trial, the trial court awarded the most significant asset in the marital estate to the husband with no offsetting distribution to the wife. In doing so, the trial court failed to consider the statutory factors under RCW 26.09.080, because it left the disabled wife with only a small fraction of the marital estate, its distribution of property was focused entirely on the character of the property, which it established using doubtful means, and it failed to value any of the assets distributed.

In light of the disproportionate division in favor of the husband, the economically advantaged spouse, the trial court also failed to properly consider the factors under RCW 26.09.090 by failing to award any meaningful spousal maintenance to the wife.

This court should reverse the trial court's orders and remand for proper consideration of the statutory factors under RCW 26.09.080 and RCW 26.09.090. This court should also award attorney fees to the wife on appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the parties "own no interest in and to any community real property." (Finding of Fact (FF) 2.8, CP 51)

2. The trial court erred in finding that “the real property located at 919 NE 245 Avenue Camas, Washington 98007 is the separate property of the Petitioner, and remains separate property notwithstanding execution of a quit claim deed and refinancing.” (FF 2.8, CP 51)

3. The trial court erred in finding that the husband “has adequately traced the separate property funds used to purchase said property, both in regard to the purchase of the vacant land in 1998 and the mobile home in 2000. Petitioner/husband has adequately traced the source of funds to his separate property.” (FF 2.9, CP 53)

4. The trial court erred in finding that “the fact that Petitioner/husband executed a Quit Claim Deed of said real property from himself to himself and Respondent/wife after marriage does not change the separate property characterization of said property; similarly the fact that Petitioner/husband placed his name and his wife’s name on the title of the mobile home after purchased does not change the separate characterization of said asset.” (FF 2.9, CP 53)

5. The trial court erred in finding that “there was no evidence adduced that any community funds had been used which

contributed to the increase in value of the separate real property referenced above.” (FF 2.9, CP 53)

6. The trial court erred in finding that “any alleged community improvements do not appreciably affect the value of said asset.” (FF 2.9, CP 54)

7. The trial court erred in finding that “there was a failure of proof regarding the wife’s claim that she invested \$8,000 of her separate property funds to the improvement of said real property.” (FF 2.9, CP 54)

8. The trial court erred in finding that “any expenditure of community funds which were made in regard to the real property were in an amount less than the reasonable rental value of said real property to the marital community. Indeed, the court finds that the community received the benefit by living in said real property at a cost which was less than the reasonable rental value of the property (the wife testified that a reasonable rental value for the property is \$1,200 per month).” (FF 2.9, CP 54)

9. The trial court erred in failing to value the property which it distributed. (See CP 35-66)

10. With regard to spousal maintenance, the trial court erred in finding that “after weighing all of the factors the court feels

it is appropriate to order the husband to pay the wife \$300 per month through the end of December, 2008.” (FF 2.12, CP 54)

11. The trial court erred in entering the Decree of Dissolution. (CP 35-49)

12. The trial court erred in entering its Findings of Fact and Conclusions of Law. (CP 50-66)

III. STATEMENT OF ISSUES

1. While the parties were dating, they sought out and purchased in the husband’s name real property where they planned to live when the parties married. Did the trial court err in characterizing this real property as wholly the husband’s separate property when the parties refinanced the property three times during the marriage, the first time to pay off the husband’s separate obligation and to make improvements on the property?

2. Did the trial court err in failing to properly consider the effect of the husband executing a quit claim deed converting his separate interest in the real property to community property?

3. Did the trial court err in failing to properly consider the RCW 26.09.080 factors in its property distribution by focusing solely on the character of assets, by failing to value any of the assets, and

by leaving the disabled wife in a financially precarious situation in comparison to the husband, the economically advantaged spouse?

4. In light of the disproportionate award of property in favor of the economically advantaged spouse, did the trial court err in failing to provide the wife with any meaningful spousal maintenance?

5. Should this court award attorney fees to the wife based on her need and the husband's ability to pay her fees?

IV. STATEMENT OF THE CASE

A. The Parties Lived Together In The Wife's Home Prior To Marriage. While Living Together They Sought Out And Purchased Bare Land Where They Planned To Build A Home Together.

Appellant Louise Abrams, age 60, and respondent Christopher Gudjohnsen, age 52, met in the mid to late 1990's. (RP 122) Both parties had been married before. (See RP 122, 266) There are no dependent children of the marriage. (RP 54, 191)

When the parties met, they each owned their own home. Mr. Gudjohnsen owned a home in Hazel Dell, which he was awarded in his previous divorce. (RP 55) Ms. Abrams owned property in Brush Prairie, where she lived in a single-wide trailer. (RP 66)

While they were dating, the parties discussed purchasing bare land together. (RP 121, 207) Their plan was to build and live in a log cabin on the land. (RP 208) The parties looked for approximately six months before locating a large lot in Camas. (RP 146, 210)

In February 1998, Mr. Gudjohnsen signed a purchase and sale agreement for the vacant land in Camas for \$141,900. (RP 56-57) The purchase of the land was contingent on Mr. Gudjohnsen selling his Hazel Dell home. (RP 56) The Hazel Dell home was sold on May 14, 1998. (RP 58) After the home was sold, Mr. Gudjohnsen and his son moved in with Ms. Abrams. (RP 66, 122, 206) Mr. Gudjohnsen contributed \$500 per month to Ms. Abrams, which "barely" covered groceries for the three of them. (RP 67, 206)

Mr. Gudjohnsen netted approximately \$79,000 from the sale of the Hazel Dell home. (RP 59) Mr. Gudjohnsen used approximately \$61,000 from these proceeds as a down payment on the Camas property (RP 66) and financed the rest of the purchase price with a \$88,200 loan with a five-year call in 2003. (RP 63) The deed for the Camas property, dated May 19, 1998, was in the husband's name only. (RP 64) Ms. Abrams testified that Mr.

Gudjohnsen offered to put her name on the property when it was purchased but she declined, expecting that her name would go on the property once the parties married. (RP 212)

B. During The Marriage, The Parties Refinanced The Property Three Times, The Husband Quit Claimed His Separate Interest In The Property To The Community, And The Parties Improved The Property With Community Funds.

The parties were married on August 21, 1999. (CP 1, RP 53, 218) The parties continued to live on Ms. Abrams' property after the Camas property was purchased. (RP 212)

After the parties married, they discussed borrowing money to make improvements on the Camas property so that they could eventually move on to the property. (RP 67) At the time, both parties were employed. (RP 67) Mr. Gudjohnsen was employed with Rapid Transfer. (RP 67) Ms. Abrams was employed with DeWils Industries. (RP 67) The parties submitted a joint loan application to obtain funds for their project. (RP 68, Exhibit 10, 11)

In April 2000, the parties obtained a loan for \$123,750, on which they were both obligated, to make improvements on the Camas property, including building a log cabin, putting in utilities, and paying for permits and architect fees. (RP 67-68, 72, 127) The loan proceeds were first used to pay off the underlying loan that

had originally been taken out in Mr. Gudjohnsen's name. (RP 73-74) The remaining loan proceeds of approximately \$32,000 were paid to the parties. (RP 73-74)

At the time the parties closed on the loan, Mr. Gudjohnsen executed a quit claim deed conveying the Camas property from his separate estate to the community for "love and affection." (RP 70, Exhibit 12) Mr. Gudjohnsen testified that the loan officer told him he had to execute the deed in order for the parties to take out the loan in both of their names. (RP 70-71) Mr. Gudjohnsen testified that he "hesitated" in signing the deed and initially protested when the bank told him to sign it, but he nonetheless signed the deed conveying his separate interest to the community. (RP 134-35) Mr. Gudjohnsen claimed that he did not know that by executing the deed he was transferring his separate interest in the property to the community. (RP 72) Ms. Abrams testified that Mr. Gudjohnsen understood what he was signing and he never told her or the loan officer that he did not want to sign the quit claim deed. (RP 214)

The parties originally planned to use the loan proceeds to cut down trees and use those trees to build the log cabin. (RP 68, 207-09) Although the parties felled forty trees – approximately one-half of the timber on the land – the log cabin was never built. (RP

68, 69, 106) According to Ms. Abrams, the parties realized they could not afford to build the log cabin. (RP 209) In any event, the loan allowed the parties to make site improvements, which allowed the parties to move on to the property. (RP 69)

In the fall of 2000, the parties purchased and moved into a double-wide trailer on the Camas property. (RP 75-76, 78) The purchase price for the trailer was \$16,140. (RP 76) The husband testified that he used separate funds – inheritance and pre-marriage cash – to purchase the trailer. (RP 77-78) Both parties' names are on the title to the double-wide trailer. (RP 137, 214)

When the parties moved onto the Camas property, Ms. Abrams rented out her property, where she and Mr. Gudjohnsen had previously lived. (RP 126, 218) Ms. Abrams deposited the rental proceeds into a community bank account. (RP 219) Ms. Abrams subsequently sold her property in 2003, netting \$28,000 from the sale. (RP 217) With these proceeds, Ms. Abrams invested \$15,000, deposited \$5,000 into a savings account, and used \$8,000 towards the cost of building a workshop on the Camas property. (RP 217) According to Ms. Abrams, the parties could not move forward with construction of the workshop without these funds. (RP 218)

The parties refinanced their loan against the Camas property in 2003, to obtain a lower interest rate. (RP 127-28) In 2005, the parties refinanced their loan on the Camas property for a third time, again to obtain a lower interest rate. (RP 80, 127-28) In total, the parties refinanced the property three times during the marriage (2000, 2003, 2005). (RP 127-28) Each time, both parties signed the loan agreement and both parties' credit was used as a basis for the loan. (RP 80, 127-28, 224) It is undisputed that community funds were used to pay down the loans. (RP 136)

By the time the parties separated, the bare land purchased before the marriage had been improved with a pump house, a garden shed, a 36 by 48 foot workshop, and the double-wide trailer purchased in both parties' names. (RP 129, 138, 230) The original loan was paid off and there were 3½ acres of timber remaining on the property, which at the time of trial was valued at \$21,301. (RP 163, 232)

C. When The Parties Separated, The Wife Was Disabled And The Parties' Most Significant Asset Was The Property Where They Lived.

Mr. Gudjohnsen petitioned to dissolve the parties' marriage on February 14, 2007. (CP 1) Pursuant to an restraining order that Mr. Gudjohnsen obtained *ex parte*, Ms. Abrams was ordered out of

the family home. (RP 96-97, 192) The order was later dismissed after a full hearing (RP 96-97, 192), but Mr. Gudjohnsen maintained control over the family residence and refused to allow Ms. Abrams to return to the home to obtain personal items such as her medicine and clothing until she obtained a court order allowing her to do so. (RP 143-45, 193)

By the time the parties separated, the wife was unemployed and had been receiving Social Security disability for the past 3½ to 4 years. (RP 114, 139) Ms. Abrams was diagnosed with degenerative arthritis in her knees, neck, shoulders, and back. (CP 13; RP 194) Both of her hips had already been replaced, and soon her knees would need to be replaced as well. (RP 194) Although Ms. Abrams had worked for DeWils Industries for 17½ years as a cabinet maker, she testified that it was unlikely that she would ever be able to return to work, as her physical condition is deteriorating. (CP 13, RP 114, 193, 195-96) She receives \$1,066 per month through Social Security (RP 196); in 2006, Ms. Abrams received \$13,470 in Social Security benefits. (RP 83) Ms. Abrams' only other income was the minimal amount she earned house sitting for friends, approximately \$300 annually. (RP 201)

Overall, Mr. Gudjohnsen is in relatively good health, although he testified that he was “practically deaf in [his] right ear and going deaf in [his] left one.” (RP 53) Mr. Gudjohnsen is a truck driver. (RP 54) A member of the Teamsters Union, he has been employed by Rapid Transfer for thirty-one years. (RP 54) In 2006, Mr. Gudjohnsen earned \$36,564. (RP 83)

While the dissolution was pending, Mr. Gudjohnsen paid temporary monthly maintenance of \$300 to Ms. Abrams, which coupled with her Social Security benefits gave her enough money to temporarily live with a female friend. (RP 200) This was only a temporary arrangement, as her friend advised Ms. Abrams that she expected her to move out three to six months after the parties’ dissolution was finalized. (RP 202) The temporary monthly maintenance was insufficient for Ms. Abrams to live on her own. (RP 198-200)

D. Without Valuing Any Of The Assets, The Trial Court Awarded Nearly All Of The Marital Estate To The Husband.

The parties appeared before Clark County Superior Court Judge James Rulli for a one-day trial. At the time of trial, the most significant assets owned by the parties were the Camas property and the husband’s pension with the Teamsters. (See CP 16) The

remaining assets were vehicles and personal property. The issues before the trial court were the characterization and distribution of the parties' assets, in particular the Camas property, and spousal maintenance. Prior to trial, the parties agreed that the wife should be awarded one-half of the community portion of the husband's pension. (RP 54-55)

At trial, the wife acknowledged the husband's separate contributions to the acquisition of the Camas property but asserted that the property was community property as established by the quit claim deed and the community contributions to the property during the marriage. (RP 211, CP 16) The wife testified that the Camas property was worth \$325,000 and presented unchallenged evidence that the remaining timber on the property was worth an additional \$21,000. (RP 163, 230) The wife asked that the community property be divided equally and that each party be awarded their separate property, including her separate investment account, the husband's initial contribution to the Camas property, and her separate contribution to the construction of the workshop. (CP 16) The wife also asked the court to award spousal maintenance of \$500 per month until the husband retires, when she would have access to the portion of his pension awarded to her.

(RP 205-06, 266) The wife has no other retirement available to her.

(RP 266)

The husband asserted that the Camas property was his separate property and asked that he be awarded that property, and asserted that no spousal maintenance should be awarded to the wife. (CP 27, 31)

The trial court found that the Camas property was the husband's separate property "notwithstanding execution of a quit claim deed and refinancing" (Finding of Fact (FF) 2.8, CP 51), because the husband had "adequately traced the separate property funds used to purchase said property, both in regard to the purchase of the vacant land in 1998 and the mobile home in 2000." (FF 2.9, CP 53) The trial rejected the wife's claim that the community increased the value of the property, finding that "any expenditure of community funds which were made in regard to the real property were in an amount less than the reasonable rental value of said real property to the marital community." (FF 2.9, CP 54) The trial court also rejected the wife's claim that she contributed \$8,000 of her separate funds toward the construction of the workshop. (FF 2.9, CP 54)

The trial court awarded the Camas property in its entirety to the husband. (CP 36) Without valuing the community portion of the pension, the trial court divided the community portion of the pension equally between the parties pursuant to their earlier agreement. (CP 36, 37) The trial court awarded the wife her separate property investment account, which at the time of trial was approximately \$17,000. (CP 37, RP 267) The trial court also distributed the parties' personal property and vehicles. (CP 36-37)

The trial court made no specific finding of the values of any of the property before it. (See CP 36-37, 51-54) For example, the trial court declined to make any determination of the value of the timber on the property and ordered the wife to be solely responsible for the appraiser's fees because it "did not use his testimony in the division of property in this case." (RP 304)

The trial court awarded an additional one year of spousal maintenance to the wife at \$300 per month, ending in December 2008. (CP 38) The trial court found that there was a disparity in income between the parties and the wife has the need and the husband has the ability to pay fees "as he earns about three times the income she does." (FF 2.12, CP 54) The trial court also acknowledged that "the wife had some physical limitations that

affect her ability to be employed.” (FF 2.12, CP 54) The trial court ordered the husband to pay \$3,000 towards the wife’s attorney fees. (CP 40)

The wife appeals. (CP 32)

V. ARGUMENT

A. The Trial Court Erred In Characterizing The Camas Property As Entirely The Separate Property Of The Husband.

Characterization of property as separate or community is a question of law. *Marriage of Martin*, 32 Wn. App. 92, 94, 645 P.2d 1148 (1982). Property acquired during marriage is presumed to be community unless this presumption is rebutted by clear and convincing evidence. *Marriage of Gillespie*, 89 Wn. App. 390, 400, 948 P.2d 1338 (1997). “Where there is any uncertainty in tracing an asset to a separate property source, the law resolves the uncertainty in favor of a finding of community character.” *Gillespie*, 89 Wn. App. at 400.

1. The Trial Court Erred In Failing To Acknowledge The Effect Of The Husband’s Quit Claim Deed Was To Convert Property That May Otherwise Be Separate Community Property.

The trial court erred in flatly rejecting the effect of the husband’s execution of a quit claim deed, which converted the

Camas property from the husband's separate property to community property. While the trial court found that the execution of the quit claim deed "does not change the separate property characterization," the trial court provides no reasoning for this proposition. (FF 2.9, CP 53) The trial court also erred in finding that the husband's purchase of the double-wide trailer in both parties' names with his separate funds during the marriage also did not change the "separate property characterization" of the trailer. (FF 2.9, CP 53)

Historically, a "spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community." ***Marriage of Hurd***, 69 Wn. App. 38, 51, 848 P.2d 185, *rev. denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993). It is up to the party claiming a separate interest to rebut the presumption with "clear and convincing" proof. ***Hurd***, 69 Wn. App. at 51. While this proposition was recently questioned in Division One's decision in ***Estate of Borghi***, 141 Wn. App. 294, 169 P.3d 847 (2007), review of this decision is currently pending in the Supreme Court. (Supreme Court Cause No. 80925-9).

Given the facts of this case, the trial court should have applied the *Hurd* presumption. When the husband executed the quit claim deed, the parties closed on a loan for which they were both liable that not only paid off the husband's separate obligation on the property but also left the parties with sufficient proceeds to begin developing the property. It is especially appropriate to presume a gift to the community because this was not a case where the refinance was done merely to obtain a better interest rate. (See RP 67-68, 72-74) In light of the obligation of over \$120,000 that both parties were required to undertake, it is only reasonable to presume that the husband gifted his separate interest in the property to the community, especially since the loan allowed the parties to begin development of the property, which the husband testified was his "dream." (RP 58, 67-68, 72-74) The trial court erred in failing to consider the effect of the quit claim deed, which at a minimum should have created a presumption that the husband gifted his separate interest in the property to the community.

2. The Trial Court Erred In Failing To Recognize The Community Interest In The Property Due To Significant Community Contributions During The Marriage.

Even if the trial court did not err in finding that the real property was separate property, the trial court erred in not recognizing the significant community contributions to the Camas property. While the wife does not dispute that the land was purchased before the parties' marriage with a down payment from the husband's separate property, she does challenge the trial court's finding that there was "no evidence adduced that any community funds had been used which contributed to the increase in value of the separate real property referenced above." (FF 2.9, CP 53)

In 2000, using the parties' community credit, the parties refinanced the Camas property and paid off the underlying loan incurred by the husband when the property was first purchased. (RP 67-68, 72-74) Using the remaining loan proceeds, the parties made improvements to the property including building a garden shed, a workshop, and felling timber. (RP 67-68, 69, 72-74) These improvements could not have been made without the parties

undertaking the 2000 loan, which indisputably was paid down using community funds. (RP 136)

The court's conclusion that the community is not entitled to any interest in the Camas property even though it was improved and maintained by the community is inconsistent with the analysis of ***Chumbley v. Beckmann***, 150 Wn.2d 1, 74 P.3d 129 (2003). (See FF 2.9, CP 54) In ***Chumbley***, the Supreme Court held that stock purchased pursuant to a community option with separate funds should be characterized based on the proportional contribution of the separate and community estates to the asset. 150 Wn.2d at 8-9. The Court rejected a lien solely for the contribution of the estate completing the purchase, holding that the community and separate estates should proportionally share in the increase in value of the asset. ***Chumbley***, 150 Wn.2d at 10; see also ***Marriage of Elam***, 97 Wn.2d 811, 817, 650 P.2d 213 (1982) (community entitled to a share of the increase in value due to inflation in proportion to the value of community contributions to the property).

This case is not like ***Marriage of Miracle***, 101 Wn.2d 137, 675 P.2d 1229 (1984), upon which the trial court apparently relied in finding that the community earned no interest in the property

despite its contributions because the community received the benefit of residing on the property. (See FF 2.9, CP 54) In ***Miracle***, the parties resided in a home that wife owned prior to marriage as a result of her previous marriage dissolution. During the marriage, the community assisted in paying the contract obligation on the house. The Supreme Court affirmed the trial court's decision declining to impose an equitable lien in favor of the community. ***Miracle***, 101 Wn.2d at 139.

The trial court in ***Miracle*** found that it was not equitable to provide the community with a lien on the separate property home for its contributions toward the mortgage when the parties lived in the home rent-free during their short marriage. ***Miracle***, 101 Wn.2d at 138. Here on the other hand, the community did more than just contribute towards a mortgage on an already-existing residence. Instead, the parties jointly undertook a loan to pay off the husband's separate obligation on the property. With the remaining proceeds from that community loan, the parties made improvements that allowed them to live on the property – something they could not do prior to undertaking the loan, as the land was bare. To “do equity” in this case would be to grant the community an interest in this property, especially where to not do so essentially leaves the wife

with only a tiny fraction of the marital estate before the court for division.

The community should share in the increase in value of the Camas property since purchase due in large part to improvements made possible by the community. *Chumbley*, 150 Wn.2d at 8-9; *Elam*, 97 Wn.2d at 817. Characterizing the property as wholly separate was an error that obviously affected the trial court's property distribution. This court should reverse and remand for redistribution in light of the proper characterization of the Camas property.

B. The Trial Court Failed to Properly Apply RCW 26.09.080 By Failing To Value The Assets And Awarding Nearly All Of The Marital Estate To The Husband.

The trial court failed to properly consider the statutory factors governing distribution of property. RCW 26.09.080 requires the court to make a just and equitable distribution of all property, both community and separate, after considering:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage . . . ;
- (4) The economic circumstances of each spouse . . . at the time the division of property is to become effective

RCW 26.09.080. The award in this case improperly failed to consider the extent of the community and separate property, to value the assets, or to consider the economic circumstances in which the trial court's award would place both parties.

1. The Trial Court's Failure To Value Any Of The Assets Requires Remand.

This court has held that the valuation of property in a divorce case is a material fact. *Greene v. Greene*, 97 Wn. App. 708, 712, 986 P.2d 144 (1999) (citing *Wold v. Wold*, 7 Wn. App. 872, 878, 503 P.2d 118 (1972)). The trial court is required to value the property to create a record for appellate review. *Greene*, 97 Wn. App. at 712 (citing *Marriage of Hadley*, 88 Wn.2d 649, 657, 565 P.2d 790 (1977)). If the court fails to do so, the appellate court may look to the record to determine the value of the assets. *Greene*, 97 Wn. App. at 712. But if the values are in dispute, this court is unable to determine whether the property division is just and equitable and must remand to the trial court. *Greene*, 97 Wn. App. at 712 (citing *Marriage of Martin*, 22 Wn. App. 295, 298, 588 P.2d 1235 (1979)).

Here, the value of the most significant asset – the Camas property – was disputed. The wife testified that she believed that

the value of the property was \$325,000, based in part on an appraisal that was prepared prior to trial. (RP 229-30) The husband asserted that the property was valued at \$223,100. (CP 31) Further, the parties disputed the value of several vehicles, the wife asserting that in total they valued \$31,000 and the husband claiming their total value was \$23,460. (CP 16, 31)

The trial court should have valued the assets that it distributed as part of the parties' dissolution. Had it done so, it would have been clear that the wife received only a small fraction of the marital estate despite her far worse economic circumstances compared to the husband.

2. The Trial Court Placed Improper Weight On The Character Of The Property By Awarding The Husband All Of His Claimed Separate Property Even Though It Comprised The Vast Majority Of The Modest Marital Estate.

The trial court's error in mischaracterizing the property was exacerbated by the fact that it let the character of the property control its property distribution. While the character of the property is a relevant consideration in distributing the marital estate, it is not controlling. *Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985). It is error for a court to give greater weight to the character of the property than the other

relevant factors under RCW 26.09.080 in dividing the parties' property. *Konzen*, 103 Wn.2d at 478. Here, the Camas property was the most significant asset in the parties' estate. Awarding the entire property to the husband without any offsetting award to the wife resulted in a significantly disproportionate award to the husband, the economically advantaged spouse.

The court's disproportionate award relied almost exclusively upon its characterization of the property. With the exception of one vehicle, which the husband agreed should be awarded to the wife, the trial court awarded each party their separate property. But RCW 26.09.080 does not limit the trial court's ability to award the separate property of one spouse to the other if necessary to make a fair and equitable property division. RCW 26.09.080 ("the court shall, without regard to misconduct, make such disposition of the property and liabilities of the property, *either community or separate*, as shall appear just and equitable") (emphasis added).

It must be clear that the trial court followed the mandate of RCW 26.09.080 and considered all of the relevant statutory factors to reach its conclusion that the property distribution is fair and equitable. Here, without any determination that an award of nearly the entire marital estate to the husband, the economically

advantaged spouse, was “fair and equitable” after consideration of the factors in RCW 26.09.080, it is unclear whether the trial court would have awarded the entire Camas property to the husband had it not first determined that it was his separate property. This court should reverse and remand to the trial court to reconsider its distribution in light of the factors under RCW 26.09.080.

3. The Property Division Leaves The Parties In Disparate Economic Situations, With The Husband Receiving The Majority Of The Assets And Three Times The Income Despite The Wife’s Greater Need.

The “ultimate concern” in distributing the parties’ property must be the economic condition of the parties at divorce. ***Marriage of Crosetto***, 82 Wn. App. 545, 556, 918 P.2d 954 (1996); RCW 26.09.080(4). In determining the parties’ post-dissolution economic condition, the trial court may consider the health and ages of the parties, their prospects for future earnings, and their necessities and financial abilities. ***Marriage of Gillespie***, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997). The trial court’s property division must not leave one spouse destitute compared to the other spouse. See ***Marriage of Olivares***, 69 Wn. App. 324, 335, 848 P.2d 1281, *rev. denied*, 122 Wn.2d 1009 (1993).

Here, the trial court found “that the wife has some physical limitations that affect her ability to be employed.” (FF 2.12, CP 54) The trial court further found that the husband “earns about three times the income” as the wife. (FF 2.12, CP 54) Despite these findings, the trial awarded nearly the entire marital estate to the husband, with minimal spousal maintenance to the wife. The trial court failed to properly consider the economic condition in which the dissolution will leave the parties.

The trial court’s property division leaves the more vulnerable spouse, the wife, with insufficient income and assets to pay her monthly expenses to live on her own. (See CP 6-10, RP 196-206) With the exception of one-half of the community portion of the husband’s pension, the only asset of any significant value awarded to the wife was her separate investment account containing \$17,000. (CP 37, RP 267) The wife testified that her expenses would be approximately \$2,513 a month if she lived on her own. (RP 198) Her income from Social Security and from maintenance that terminates in December 2008 will leave a short fall of over \$1,000 per month. (See CP 6-10) The wife’s investment account will be depleted in little over a year to meet her monthly expenses. The much younger husband, on the other hand, continues to work,

to accrue separate pension benefits, and to have the benefit of living on real property improved with community credit and the wife's separate property.

The trial court erred in failing to consider these economic circumstances in its property distribution.

C. In Light Of The Disproportionate Award Of Property In Favor Of The Husband, The Trial Court Should Have Awarded Spousal Maintenance For A Longer Duration And In An Amount Adequate To Meet The Wife's Monthly Expenses.

This court should also remand to the trial court to revise the maintenance award. The trial court cannot isolate the determination on maintenance from its property distribution. See *Marriage of Rink*, 18 Wn. App. 549, 552-553, 571 P.2d 210 (1977) ("the trial court is not only permitted to consider the division of property when determining maintenance, but it is required to do so"); RCW 26.09.090(1)(a) (in determining maintenance the trial court must consider the financial resources of the parties, including the property apportioned to them); RCW 26.09.080(4) (in determining a property distribution the court must consider the economic circumstances of the parties). In this case, the trial court should have provided the wife with a more meaningful maintenance

award in light of a property distribution that gave the husband almost all of the marital estate.

The husband has a significantly greater earning capacity than the wife, and the property distribution leaves the parties in vastly different financial circumstances. Where the parties' "disparity in earning power and potential is great," the appellate court "must closely examine the maintenance award to see whether it is equitable in light of the post-dissolution economic situations of the parties." *Marriage of Sheffer*, 60 Wn. App. 51, 56, 802 P.2d 817 (1990) (remanding on issue of maintenance to more nearly equalize parties' post-dissolution standard of living). Further, the trial court is to establish maintenance for "such periods of time as the court deems just." RCW 26.09.090(1). Here, limiting the maintenance to \$300 per month for only one year was inadequate to meet the wife's needs.

The evidence showed, and the trial court found, that the wife's physical infirmities affected her ability to be employed. In all likelihood, the wife will only have the benefit of her Social Security disability payments of \$1,066 per month and no more until the husband retires and she is able to access his pension. The wife testified that a maintenance award of \$500 per month would allow

her to live on her own. (RP 205-06) On the other hand, the husband, who is younger than the wife, earns “three times” the income of the wife and clearly has the ability to pay maintenance. (FF 2.12, CP 54) Further, he will likely work for several more years, preventing the wife from obtaining any payment from his pension until he retires.

This court should reverse the trial court’s maintenance award and remand for the trial court to provide the wife with a more meaningful maintenance award to balance the parties’ economic circumstances.

D. Attorney Fees Should Be Awarded To The Wife On Appeal.

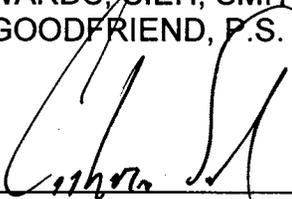
Appellant asks this court for her attorney fees and costs for this appeal on the basis of the wife’s need and the husband’s ability to pay attorney fees. RCW 26.09.140. This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; **Leslie v. Verhey**, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Ms. Abrams will comply with RAP 18.1(c).

VI. CONCLUSION

This court should reverse and remand for a redistribution of the marital estate based on proper characterization of the factors in RCW 26.09.080. This court should remand for reconsideration of the maintenance award in light of the property distribution and considering the factors under RCW 26.09.090. This court should also award appellant her fees on appeal.

Dated this 26th day of June, 2008.

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

By:  _____

Catherine W. Smith
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Valerie A. Villacin
WSBA No. 34515

Attorneys for Appellant

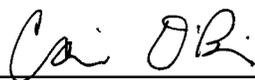
DECLARATION OF SERVICE

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

That on June 26, 2008, I arranged for service of the foregoing Brief of Appellant to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Marcine Miles Miles & Miles, P.S. 1220 Main St., Suite 455 Vancouver WA 98660	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Suzan L. Clark Attorney at Law 1101 Broadway St., Suite 250 Vancouver, WA 98660	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 26th day of June, 2008.



Carrie O'Brien

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