

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

*SW*

No. 42351-1-II

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IN RE THE MARRIAGE OF

CARY R. CARUGHI,

Appellant

v.

JOHN G. CARUGHI

Respondent.

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**APPEAL FROM SUPERIOR COURT OF  
CLARK COUNTY  
HONORABLE JUDGE SCOTT COLLIER, JUDGE  
CLARK COUNTY CAUSE NO. 09-3-02822-0**

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BRIEF OF RESPONDENT

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*PM 2-28-11*

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## **I. Summary of Argument**

Mr. Carughi disputes Appellant's arguments that substantial evidence does not support the trial court's rulings. Based on the evidence supporting Mr. Carughi's answers to the issues presented, Mr. Carughi requests that this court reject the arguments of the Appellant and award him attorney fees for having to respond to this frivolous appeal.

## **II. Issues in Response to Appellant's Brief**

1. Does substantial evidence support the finding that the value of the home is \$238,000? Answer: Yes.
2. Does substantial evidence support the finding that the Wife committed waste of the marital assets? Answer: Yes
3. Does substantial evidence support the finding that the guns were the separate property of the husband? Answer: Yes.
4. Does substantial evidence in the record support the finding that the wife lacked authority and control over the guns in which to pawn them? Answer: Yes.
5. Does substantial evidence in the record support the finding that the award of attorney fees to the husband was justified? Answer: Yes.

### **III. Restatement of the Case**

The parties, John, age 49, and Cary, age 50, were married on September 17, 1992. They were separated on September 29, 2009 when the wife left the marital residence. RP 108. Mr. Carughi is an electrician who had been employed as a contract worker in the Mideast for the past several years. RP 103. His gross income from his current employment amounted to approximately \$16,000 per month. RP 104. Mrs. Carughi worked as a wind tower pilot and had been so employed since the date of separation. RP 488-493. The couple purchased their home in 2004 for \$197,000. RP 105. The husband sold a portion of his guns for a down payment on the home. RP 239. The husband had inherited a large collection of antiques firearms and other weapons from his father which were identified by Mr. Carughi as part of his inheritance. RP 172-191. Mr. Carughi testified that he picked up over 200 guns at the time of his father's death. RP 141. The weapons were mainly from the civil war era. RP 173-175. RP 259. There was a disparity in the number of guns that were in the collection and the inventory which had been given to Mr. Carughi by his sister. RP 164. Mr. Carughi testified that the actual number of guns was reduced on the inventory to avoid death tax liability RP 164-165. Share Ward, Mrs. Carughi's sister, also identified the large number of guns in the inheritance through photographs taken at the time Mr. Carughi acquired them. RP

277-278. The wife admitted these guns were taken from the sister's home and not purchased during the marriage. RP 418. Initially the collection was kept at the residence. RP 151. They were then moved and stored at a friend's house for security reasons. RP 151-152. After an intensive search determined the guns were missing and after contacting his wife, Mr. Carughi notified Clark County Sheriff's Department. RP 157. Mr. Carughi testified that he never gave anyone permission to dispose of the guns. RP 152. After preliminary investigations took place, it was revealed that the Cary Carughi and her son Chris Craig had moved the guns to a commercial security and systematically pawned over 30 antique guns to Beaverton Pawn Shop and Money Market in Oregon. Many of the transactions were completed by the wife's son, Chris Craig at the wife's direction. RP 195. Chris Craig signed some of the pawn receipts RP 288-293. Chris had access to the guns through his mother. On one specific occasion on January 3, 2009, the son made 2 transactions while the mother was out of state. RP 288-293. RP 458. During the Sheriff's investigation into the theft, Mrs. Carughi admitted that she worked with her son, as a team to dispose of the weapons. RP 460. The wife and her son began pawning her husband's guns in March, 2008 and continued doing so as late as March 21, 2009. RP 195. RP 460. The wife acknowledged that at no time did she tell her husband of her pawning activities. RP 460. She

acknowledged that the husband did not know that the weapons had been moved from their friend's house. RP 460. It was done without his knowledge or consent. The wife received approximately \$100,000 from the pawning of the husband's gun collection in a one year period from March, 2008 thru March 31, 2009. RP 202, RP 295. The facts reflect that in addition to her pawning guns, the marital home was in foreclosure for lack of payment. RP 156. The wife had made a concerted effort to keep this information away from the husband by stopping the mail when he would come home. RP 159-160. RP 431, RP 495. The wife received income from the husband to pay the mortgage, but she failed to do, so, making only three payments in fourteen months. RP 428-430. Despite being given between \$4500 and \$6000.00 per month for bills, the wife still pawned the husband's guns. RP 198. The couple's bills were less than \$2000.00 per month and the husband sent home an average of \$4500 per month. RP 320. The average bills per month to run the household were \$1457.00. RP 321. During the period January 2008 through September of 2009, the wife removed approximately \$140,000 from the couple's bank accounts without explanation. RP 356-366. Mrs. Carughi denied that she had a gambling problem. RP 239. Many of the cash transactions of the removal of large amount of cash were conducted at or near casinos. RP 331, RP 354, RP 366. Mrs. Carughi's sister testified that she was

estranged from her sister because she did not want to part of the lies about gambling. RP 282.

#### IV. Argument

Substantial evidence supports the finding that the value of the home is \$238,000. In setting values on property before it, courts have generally used the fair market value of each item. *In Re Marriage of Hurd*, 69 Wn. App 38, 48, 848 P.2d 185 review denied, 122 Wn.2d 1020 (1993). “Fair Market Value” is defined in Revenue Ruling 59-60, as follows: “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts.” This definition is generally accepted by Washington courts. *In Re Marriage of Landauer*, 95 Wn. App 579, 591, 975 P.2d 577, review denied, 139 Wn.2d 1002 (1999). The CMA reported the current value was \$238,000. RP 466. Mr. Carughi stated that the CMA valued should be accepted by the court. RP 466. The court accepted this value as there was no testimony to oppose this assertion. RP 589.

Substantial evidence supports the finding that the Wife committed waste of the marital assets. A spouse is required to act in good faith when managing community property and a disposition of community funds is within the scope of a spouse's authority to act alone only if he or she acts "in the community interest. It is a special form of partnership with the spouses not only owing each other the highest fiduciary duties, but also with [each spouse] charged with the statutory duty to manage and control community assets for the benefit of the community." *Schweitzer v. Schweitzer*, 81 Wn. App. 589, 597, 915 P.2d 575 (1996); Mr. Carughi testified that after payment of bills and taxes, he should have had \$80,000.00 in the bank when he came home. Instead, there was approximately \$20,000.00 and he and his wife argued about what happened to the money. RP 199. It was only through the litigation process that Mr. Carughi found out that his wife had a gambling problem. RP 200. The wife testified that she was not good at paying the bills and fell behind in payments. RP 530-533. She pawned guns and attempted to refinance the house without her husband's knowledge. RP 533. Mrs. Carughi testified that she used the money for gambling and used cash for other things. RP 534-535. The wife offered no explanation for the depletion of the couple's assets in any of her testimony, nor did she return any of the money to the community. RP 534-536. The court properly

considered her wasting of community assets in its findings as a result of this testimony.

Substantial evidence support the finding that the guns were the separate property of the husband or in the alternative, the distribution of property was equitable. Mr. Carughi testified that he never authorized his wife to dispose of his gun collection. RP 201. It is well-established that any mischaracterization of property (as separate or community) will not invalidate the property award so long as the result is equitable. *Marriage of Olivares*, 69 Wn. App. 324, 848 P.2d 1281 (1993); *Marriage of Brady*, 50 Wn. App. 728, 750 P.2d 654 (1988); *Marriage of Brossman*, 32 Wn. App. 851, 650 P.2d 246 (1982); *Worthington v. Worthington*, 73 Wn.2d 759, 440 P.2d 478 (1968). A vested inheritance is separate property, but must be considered in making a property division. *In re Marriage of Hurd*, 69 Wn. App. 38, 49, 848 P.2d 185, review denied, 122 Wn.2d 1020 (1993). Although a court may lack the authority to set aside a spouse's fraudulent transfer of marital property to a third party, the court, using its equitable powers, may allocate the remaining separate and community property or enter judgment against the spouse to account for the wrongful transfer. RCW 26.09.080 *In re Marriage of Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008) "[T]he fact that 'fault' is no longer a relevant query does not

preclude consideration of all factors relevant to the attainment of a just and equitable distribution of marital property. The dissipation of marital property is as relevant to its disposition in a dissolution proceeding as would be the services of a spouse tending to increase as opposed to decrease those same assets. In *Clark* the court stated, “It is apparent from the record that the testimony relating to Mr. Clark’s profligate life style was admitted and considered by the court not for the purpose of establishing ‘fault,’ but for the purpose of determining whose labor or negatively productive conduct was responsible for creating or dissipating certain marital assets. This was not error.” *In re Marriage of Clark*, 13 Wn. App. 805, 808, 538 P.2d 145, *review denied*, 85 Wn.2d 1001 (1975). While RCW 26.09.080 gives courts discretion to award one party’s separate property to the other, it does not require such an invasion unless necessary to make a “just and equitable” distribution. *Ovens v. Ovens*, 61 Wn.2d 6, 376 P.2d 839 (1962) (“an equitable division of the total property involved does not entail a right to an equal division of separate property”). If the Legislature intended that separate property be awarded to the non-owning spouse as freely as community property can be awarded to either spouse, then there would be no need for the Legislature to have distinguished between community and separate property in the ways that it already has done. RCW 26.16.010 (spouse can manage and sell separate

property “to the same extent or in the same manner as though he or she were unmarried”); RCW 11.02.070 (spouse can devise separate property without regard to the wishes or interests of the other spouse); RCW 11.04.015 (under intestate succession, a surviving spouse only inherits half of the separate property of the deceased spouse and all of the community property if there are living issue). Further, our courts have stated: “the court is required to consider among other facts the separate property of the parties, but this consideration does not require the court to invade the separate property.” *Moore v. Moore*, 9 Wn. App. 951, 953, 515 P.2d 1309 (1973); Where, as here, the separate property at issue is the result of the husband’s parents’ careful stewardship, which his father specifically intended to give only to his son after his death, the property was properly awarded to the husband in keeping with their wishes. *Ovens v. Ovens*, 61 Wn.2d 6, 376 P.2d 839 (1962) (awarding the husband all of his traceable separate property was equitable in view of the fact that it was an inheritance from his mother). The court awarded the gun collection to the husband and the court considered testimony that the wife kept a warehouse of collectibles that the husband did not have details of. RP 245. The court additionally considered the amount of money that had been placed into accounts by the husband and spent by the wife in his absence. The evidence supports the court’s finding in this regard. A just and equitable

division under these circumstances did not require a distribution from the husband's separate estate to the wife. *Holm v. Holm*, 27 Wn.2d 456, 466, 178 P.2d 725 (1947) (reversing a property division that provided the wife with one-half of the husband's separate property because the [wife] could have been "amply provided for out of the community property, without invading the separate property of the [husband]"). While giving the guns to the husband, the wife received her collectible items consisting of cookie jars, rug beaters, antique glass and lighthouses. RP 509-510. She also had egg plate collections. RP. 516. After a thorough analysis, the court properly determined that the majority of guns were the husband's separate property which passed to him from his father. RP 605-610. The court then reviewed other property of the marriage and divided it equitably with input from the parties. RP 633-643.

Substantial evidence in the record support the finding that the wife lacked authority and control over the guns in which to pawn them. "[T]he right of the spouses in their separate property is as sacred as is the right in their community property." *Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009). In keeping with the father's wishes the husband always maintained his inherited assets separate from the community property. In fact the husband testified he only purchased eight guns during his

marriage. RP 135. The wife testified that he may have bought more than the eight guns but that the majority of the guns were from the inheritance RP 439. The only time that the husband contributed his separate property to the community was for the specific purpose of purchasing the marital residence. At that time he sold a very small number of the less valuable antique weapons for that purpose. Mr. Carughi testified that he never gave his wife permission to sell any of the guns. RP 152. Mrs. Carughi acknowledged this by deceiving her husband about her activities. RP 260. Mrs. Carughi and her son systematically hid the multiple pawning of the weapons from the husband indicating that she knew her actions were not sanctioned RP. 202, 295, 593. The court properly found that there was no evidence to support the wife's activities as being sanctioned by the husband.

Substantial evidence in the record support the finding that the award of attorney fees to the husband was justified. Many of the court's rulings had to be based on credibility findings and the wife repeatedly admitted that she lied. RP 576-578. The husband asked the court to consider these fees as an advance on the wife's property distribution based on the evidence presented. *In Re Marriage of Glorfield*, 27 Wn. App 358, 617 P.2d 1051, review denied, 94 Wn.2d 1025 (1980). In *Glorfield*, the temporary maintenance

awarded to wife was deducted from her total award when the court determined she was underemployed. Likewise, the court may consider the frugal lifestyle of a party to the extent that it helped to build the marital estate. *Morse v. Morse*, 42 Wn.2d 229, 254 P.2d 720 (1953). Here the husband earned the larger of the incomes and sent it home so that the community debts could be paid. His efforts more than provided for the day to day needs and community debts. Despite this financial security, the wife wasted the couples' incomes and the husband's separate assets by and through her gambling addiction. She withdrew \$14,662.00 in cash withdrawals alone in the first three months of 2007. RP 330-331. By October she had taken out another \$17463.00 RP 331. By December another \$13,000.00. RP 331. The husband had to spend more than 35 days in the United States in 2009, which then implicated the couple to have to pay taxes in an amount of \$17,000.00. In one month – May of 2008, the wife withdrew over \$10,000.00 in cash RP 361. Mrs. Carughi admitted that she made multiple withdrawals at casinos and used it for gambling. RP 444. The wife stated she could not remember what she did with the \$10,000 check she herself cashed at the bank. RP 445. But for the wife's actions regarding the mortgage foreclosure and pawning of guns, the husband would not have had to be in the United States more than the 35 days allowed. As a direct result of the wife's actions, the husband remained in country and incurred a large tax

liability. The wife admitted that she lied and omitted \$30,000 in income in her 2010 tax return. RP 412. The husband was required to buy back his guns from the pawn shop and to incur legal expenses in order to recover the guns which had been sold by the wife. RP 262. The guns had been pawned by the wife in an amount that exceeded \$150,000. RP 332. The husband also had to send home additional money to the wife when she requested it for her mother's eye surgery and what she claimed was increased gas costs. RP 264. The wife lied to the pawn brokers and told them that the reason she needed the money was because her husband was not sending any money home. RP 343. The court considered these factors in making a property award and the evidence in the case supports the court's conclusions and division of assets.

#### **V. Standard of Review**

"[Trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion." *Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) An appellate court will uphold a finding of fact if substantial

evidence exists in the record to support it. *Burrill v. Burrill*, 113 Wn.App. 863, 868, 56 P.3d 993 (2002). Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Id.* So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. *Id.* This is because credibility determinations are left to the trier of fact and are not subject to review. *Id.* The reviewing court defers to the trial court because of its unique opportunity to personally observe the parties and the witnesses. *Standina Rock Homeowners' Assoc. v. Misich*, 106 Wn. App. 231, 244, 23 P.3d 520 (2001). In a divorce proceeding, the standard of review is whether the findings of fact are supported by substantial evidence and, in turn, whether those findings of fact support the conclusions of law. *Pennington v. Pennington*, 93 Wn. App. 9 13, 9 17, 97 1 P.2d 98, 10 1 (1 999), affirmed 142 Wash 2s 592, 14 P. 3d 764 (2000). When a determination is whether evidence shows that something occurred or existed, it is a finding of fact; when the determination is made by a process of legal reasoning from facts in evidence it is a conclusion of law. *State v. Niedergang*, 4 3 Wn. App. 656, 658-59, 719 P.2d 576 (1986). Property division in dissolution is reviewed for abuse of discretion. *In re Marriage of Kraft*, 119 Wash.2d 438,450, 832 P.2d 871 (1992). The property division here was well within the discretion of the court. RCW 26.09.080 sets forth the relevant factors in the disposition of

property and liabilities as follows: "In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to: (1) The nature and extent of the community property; (2) The nature and extent of the separate property; (3) The duration of the marriage; and (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time." No single statutory factor has greater weight as a matter of law, but rather the trial court should weigh all relevant factors to arrive at a just and equitable division of property. *In Re Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97 (1985). The statutory factors listed above are not exclusive, and the court should consider all relevant factors when determining how to distribute the property and debts of the parties. RCW 26.09.080. The court, for example, may consider the amount of temporary maintenance paid by one spouse to the other during the

pendency of the proceeding. *In re Marriage of Glorfield*, 27 Wn. App. 358, 362, 617 P.2d 1051 (1980). The trial court has the duty to characterize the property as either community or separate. *In re Marriage of Olivares*, 69 Wn. App. 324, 329, 848 P.2d 128 1, review denied 122 Wn.2d 1009 (1993). To accomplish this, the court may consider the source of the property and the date it was acquired. *Olivares*, supra. Property acquired during marriage is presumed to be community in character. The presumption is not rebutted unless direct and positive evidence is presented that the property is separate in character. The burden is on the party arguing that separate property has been converted into community property to prove the transfer by clear and convincing evidence, usually requiring a writing evidencing intent. *Marriage of Skarbek*, 100 Wn.App. 444,997 P.2d 447 (2000). There was testimony by the husband, the wife, and family members that the majority of the gun collection came from the inheritance. The court properly awarded the value of this collection to the husband in the distribution of assets.

#### **VI. Request for Attorney Fees**

The trial court's decision on whether to award attorney's fees is reviewed for abuse of discretion. *Mattson v. Mattson*, 95 Wn. App. 592,605, 976 P.2d 157 (1999). The award by the trial court in this case is supported by the evidence. Mr. Carughi is entitled to attorney fees in this appeal. RCW 26.09.140 authorizes an award of reasonable fees related to any proceeding

under RCW 26 after consideration of financial resources of both parties.

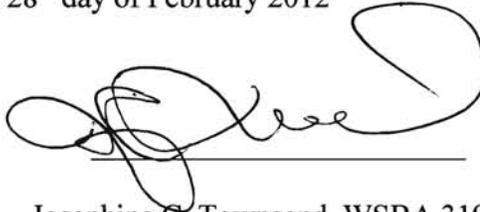
RCW 26.09.140. "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." *Id.* "An important consideration apart from the relative abilities of the two spouses to pay is the extent to which one spouse's intransigence caused the spouse seeking the award to require additional legal services." *In re Marriage of Morrow*, 53 Wn. App. 579, 591, 770 P.2d 197 (1989). "When intransigence is established, the financial resources of the spouse seeking the award are irrelevant." *Id.* Attorney fees for intransigence may be awarded upon a showing of bad faith and breach of fiduciary duty to a spouse. *In re Marriage of Sievers*, 78 Wn. App. at 31. In *Sievers*, the husband and wife reached settlement which was put on the record, but the decree incorporating the agreement was not entered for another four months. *Id.* at 294. The agreement called for each party to be responsible for income taxes on their share of income distributed by their S Corporations through entry of the decree. *Id.* Income through the date of the settlement agreement was \$550,000. *Id.* at 293. Between the settlement date and date of entry of the decree, the husband distributed an additional \$5.7 million to himself, but nothing to the wife. *Id.* at 295, the husband refused to admit liability for anything other than half of the tax on the entire \$6 million-plus distribution,

although the wife had received only \$225,000. *Id.* at 295. A "party to a property settlement agreement owes a fiduciary obligation and a duty of good faith and fair dealing to attempt to draft formal contract language that will honor that agreement." *Id.* at 311. The court awarded the husband attorney fees, based on the intransigence shown by the wife. Wife is fully responsible for not only the fees and costs Mr. Carughi has incurred in this case, but the costs he has incurred defending his property settlement against this appeal. Her bad faith and intransigence justify an award of fees, regardless of the parties' relative economic position. The Court should find this appeal frivolous and award Mr. Carughi attorney fees. RAP 18.9(a) permits an award of sanctions against a party who files a frivolous appeal. An appeal is frivolous if there are no debatable issues upon which reasonable minds may differ and it is so devoid of merit that there is no possibility of reversal. *Marriage of Wasner*, 111 Wn. App. 9, 18, 44 P.3d 860 (2002). Not a single issue raised by Appellant is debatable. Above all, she seeks to retry her case on appeal and to avoid further sanctions in her federal court case which is still pending. There is no merit to her appeal and the trial court's rules should be upheld.

**VII. Conclusion**

The court's finding of fact and conclusions of law should be affirmed. The substantial evidence in the record supports the findings of fact and conclusions of law issued by the trial court. John Carughi should be awarded all fees and costs incurred in this appeal.

Respectfully Submitted, this 28<sup>th</sup> day of February 2012

A handwritten signature in black ink, appearing to read 'J. Townsend', written over a horizontal line.

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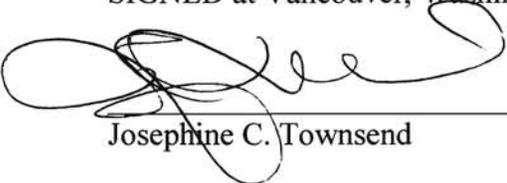
**DECLARATION OF SERVICE**

I, , hereby certify that I have served a true and correct copy of the foregoing *REPLY BRIEF OF RESPONDENTY* upon the individual(s) listed herein by the following means:

Suzan L. Clark, Attorney at Law  
1101 Broadway Street Suite 250  
Vancouver WA 98660  
Via Courier

I declare under the penalties of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Vancouver, Washington, this <sup>28<sup>th</sup></sup> day of February , 2012.

  
\_\_\_\_\_  
Josephine C. Townsend